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Supreme Court, U.S.
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No.____

In the Supreme Court of the United States

Susan B. Showalter,
Petitioner;

v.

Albuquerque Title Company, Inc.
Respondent;

v.

NationsBank, N.A.,
Respondent;

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF
THE STATE OF NEW MEXICO

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The applicability of state laws to National Banks and their operating subsidiaries raise questions of federal preemption and regulatory enforcement by the OCC. This action began with an Order against BNY Clearing Corp. in Wisconsin utilized by NationsBank to prevent payment of funds to Petitioner requested by Albuquerque Title so they could extend credit to close a real estate transaction Petitioner was not a party to. Bank brought a Declaratory Judgment action in New Mexico State Court. Outcome was a decision that Bank was the "Owner" of the funds, although they refused to produce the signature card, which they deemed lost, in violation of Federal Record-Keeping requirements. Court's holding and analysis conflicts with decisions of other courts and a relevant decision of this court, Watters v. Wachovia No. 05-1342, which found the National Bank Act, Title 12 U.S.C.484 (a) gave the OCC the duty to enforce regulatory compliance and preempts the State.

Whether Title 12 Chp.16, governing National Banks and their subsidiaries record keeping and consumer disclosures, and Title 15, 16 CFR 444.2 prohibiting extensions of credit for confessions of judgment preempts the State and Insurance regulation where such business is not regulated by State of New Mexico and whether a Title Company can deny Title Insurance when they proceeded to close in violation of a Court Injunction? Whether Wisconsin State Court proceeding was a violation of Petitioners right to due process guaranteed by the Fourteenth Amendment? Whether this was an Unfair Debt Collection or Unconscionable Trade Practice?

PARTIES TO THE PROCEEDING

Wisconsin Circuit Court
NationsBank N.A., now Bank of America N.A., Plaintiff
Everen Securities, now Wachovia and BNY Clearing Corp. Defendants

New Mexico State Court
NationsBank, N.A., Plaintiff, Defendant
Susan B. Showalter, Defendant, Counter Plaintiff, Cross Plaintiff, Third Party Plaintiff, and Appellant in the Court of Appeals
Albuquerque Title Company, Inc., a Subsidiary of Commonwealth Insurance, now Land America Title Company, Inc., Defendant and Cross Defendant
Midwest Acquisitions, Inc., Defendant, Cross Defendant, Cross Plaintiff
Demetrious Dellaportas, Third Party Defendant

Midwest and Demetrious Dellaportas elected not to participate in the Court of Appeals.

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New Mexico Supreme Court Order affirming New Mexico Court of Appeals NationsBank v. Showalter cert. denied 2007-NMCert-010 172 P.3d 1285, (COA No. 27,098) entered October 22, 2007, New Mexico Ct. of Appeals No. 27,098 Memorandum Opinion filed June 20, 2007, New Mexico Court of Appeals Proposed Disposition No. 27,098, CV-98-11599 filed April 17, 2007, District Court Judgment on Mandate entered October 11, 2002,

Ex-Parte Order entered December 2, 1998, CV No. 98-CV-008851, Milwaukee Wisconsin Circuit Court, NationsBank v. BNY Clearing Corp., and Everen Securities, now Wachovia.

JURISDICTION

(i) Orders sought to be reviewed are New Mexico Ct. of Appeals Memorandum Opinion Filed June 20, 2007, Proposed Disposition, and Judgment on Mandate entered October 11, 2002.
Exparte Order entered December 2, 1998, CV No. 98-CV-008851, NationsBank v. BNY Clearing and Everen Securities, Milwaukee Wisconsin Circuit Court.

(ii) State of New Mexico Supreme Court entered Order denying Motion to Reconsider March 3, 2006.

(iii) New Mexico Court of Appeals does not retain copies of Orders granting Motions for Extension of Time to File Petition for Writ of Certiorari

(iv) Statutory Provisions believed to confer jurisdiction on this Court to review the

judgment on a Writ of Certiorari; Federal Jurisdiction pursuant to 28 §1331, Federal Question §1332 Diversity, and Amount in Controversy and Title 28, Part IV, Chapter 81, Supreme Court, 1257(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(v) Supreme Court Rule 10 providing for exercise of this Court's supervisory power in cases which have exceeded the boundaries of normal and accepted judicial procedure.

CONSTITUTIONAL PROVISIONS, REGULATIONS AND STATUTES[1]

Fourteenth Amendment to the Constitution
United States Constitution, Article VI, Clause 2, Supremacy Clause
New Mexico Constitution Article II, Sec.1, Sec 4

TITLE 28, Part IV, Chapter 81, Supreme Court, 1257(a)
TITLE 28, Part IV, Jurisdiction and Venue, Chapter 85, §1331, Federal Question §1332(a) Amount in Controversy (1) Diversity, §1359 Parties Collusively Joined or Made

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[1] Pertinent text set out in the Appendix

Uniform Declaratory Judgment Act
TITLE 28, Part VI, Chapter 151§ 2202

31 CFR§ 103.33, Records to be Kept and Maintained by Financial Institutions

TITLE 12, Banks and Banking, Chapter I, Comptroller of the Currency, Department of the Treasury,
12 CFR 7.4008, Sec. Lending
(b) *Standards for loans.*
(c) *Unfair and deceptive practices*
(d) *Applicability of State Law.*
TITLE 12, Chapter 16, Federal Deposit Insurance Corporation, 1831X. Insurance Consumer Protections, Sec. 1829b. Retention of Records by Insured Depository Institutions
TITLE 12, Banks and Banking, Chapter 21, Financial Recordkeeping Sec. 1953. Record keeping and procedures (a) Regulations

Uniform Deceptive Trade Practice Act
NMSA 57-12-2 (D) (14) (15) (17)
Unconscionable Trade Practice
NMSA 57-12-2(E) (2)
Remedies
NMSA 57-12-10

TITLE 15, Commerce and Trade, Chapter 41 Consumer Credit Protection Sub Chapter V §1692e. False and Misleading Representations 1692f Unfair Practices Subchapter VI-Electronic Funds Transfers Sec. 1693
TITLE 15 – Commerce and Trade Chapter 96- Electronic Signatures in Global and National

Commerce Sub Chapter I – Electronic Records and Signatures in Commerce
15 USC Sec. 7001
TITLE 15, Commerce and Trade,
Chapter 20, Regulation of Insurance Section 1012(b) Federal Regulation of Insurance

TITLE 16, CFR Commercial Practices 444—Credit Practices Sec. 444.2 Unfair Credit Practices (a) (2) Fair Debt Collection Act

New Mexico Administrative Code,
NMAC 13.14.18.8 Promulgated Forms:
NMAC 13.14.18.9 Alteration or Substitution of Forms Prohibited;

STATEMENT

This case comes to the Court for review after final appeal of the State of New Mexico's last court of resort involving claims against Albuquerque Title Company, Inc. (ATC) raising questions of Federal preemption of State Laws in the Regulation of Insurance in areas where the State does not have sufficient regulatory procedures in place and in the area of Federal record keeping requirements, electronic fund transfers and the applicability of state laws to national banks and their operating subsidiaries and the duty of the OCC to enforce regulatory compliance of National Banks and their subsidiaries.

Decision in this case conflicts with a recent decision of this Court which found in Watters v. Wachovia 500 U.S.___(2007) that the National Bank Act 12 U.S.C.§§481,484(A) gave OCC the duty to enforce regulatory compliance under Federal Law

and preempts the States rights to enforce regulatory compliance of National Banks and their operating subsidiaries.

New Mexico Court sanctioned a Wisconsin State Circuit Court's departure from the accepted and usual course of judicial proceedings, by failing to recognize that an action brought in Wisconsin affecting Petitioners property should have been void, was a violation of the right to due process guaranteed under Fourteenth Amendment such as to call for an exercise of this Court's supervisory power.

There is National interest regarding the Court's treatment of consumer rights in Electronic Funds Transfers as those Rules and Regulations are not fully developed.

BACKGROUND

This action began as an exparte temporary restraining order requested by NationsBank, N.A., now Bank of America of North Carolina, in a Circuit Court in Wisconsin against Everen Securities, now Wachovia, and BNY Clearing Corp. The Order was obtained to prevent payment of funds to Petitioner, which Albuquerque Title Company, Inc. (ATC), now Land America Title, represented were committed to a real estate transaction. Affidavit used to obtain the Injunction claimed the funds would be due to Petitioner upon her demand. After the Order was issued, but prior to the hearing on the matter, NationsBank, at the request of the Title Company extended credit in Petitioners name for use in closing a real estate transaction, Petitioner was not a party to.

Petitioner is a resident of New Mexico. NationsBank admitted in pleadings that it was a procedural impropriety to illegally detain and

convert personal property pending suit. Wisconsin Court believed New Mexico was a more convenient and proper jurisdiction to determine rights of the parties, and ordered the funds transferred to NationsBank to be held in an interest bearing account for the benefit of Petitioner, the Buyer, or the Title Company as decided by a New Mexico Court of competent jurisdiction.

NationsBank brought a Declaratory Judgment Action in New Mexico State Court asking for *their* right to the funds they lent to the Title Company in Petitioners name, $318,705.20. Petitioner filed Claims against NationsBank N.A., Albuquerque Title and Buyer, Midwest, for damages for the unauthorized use of her funds. Buyer and Title Company failed to answer within the time frame, which should have been a default. Decision found NationsBank had authority over the funds and Petitioner did not have signature authority on the account, although NationsBank N.A. refused to produce the signature card, which they deemed was lost, in violation of Federal Record Keeping requirements. New Mexico Court of Appeals found March 20, 2002, "To the extent that Showalter has a claim against ATC, it is not because she was entitled to the funds, but because of any misrepresentation of ATC" which deceived or mislead Showalter. Although Wisconsin Court proceeding was about the funds, New Mexico Court of Appeals found Petitioner's funds were committed to the account and that Petitioner's damages stemmed from the Unfair Trade Practices of ATC.

Trial Court granted Petitioner the right to an oral contract with Albuquerque Title, however, her attorney had moved for Interlocutory Appeal and

failed to enter the Order. Prior to that ruling, Judge stated if she granted an Oral agreement, Petitioner would have all claims against Title Company. Although Petitioner's attorney was told to enter the Order, Title Company attorney entered an Order, which did not reflect Court's oral ruling. Order was entered same day case was accepted for appeal, April 3, 2001. Court of Appeals affirmed the Partial Summary Judgment decisions of the Trial Court, reversed the decision on Petitioner's Unfair Trade Practice Claim against ATC in Petitioner's favor and remanded to Trial Court for further action consistent with decision. Trial Court entered Judgment on Mandate October 11, 2002, which reversed decision in Petitioner's favor, stated decision was final, but failed to grant damages on the Unfair Trade Practices claim. Court of Appeals Opinion, March 20, 2002 recognized Petitioner's claims were based on an Unconscionable Trade Practice,

> "Showalter bases her unfair trade Practice counterclaims on NMSA 1978, 57-12-2(E) which identifies as "unconscionable trade practice" any act in connection with services or in the collection of debts which takes advantage of the lack of knowledge ability experience or capacity of a person or results in a gross disparity between the value received by a person and the price paid"

The first appeal was taken to establish the nature of the account, which all parties thought would materially expedite the outcome of the case. It did not address all claims. After Interlocutory appeal, Court of Appeals denied Petitioners rights to appeal any issue which had not been raised in prior appeal, however, some issues could not be addressed

until Court determined the nature of the account.

Court of Appeals Final Memorandum Opinion June 20, 2007 "found there was nothing to suggest that prior decisions were erroneous." However, they did not grant damages. Procedural errors call for this Court's exercise of their supervisory authority. NationsBank was allowed to move for Summary Judgment a second time after claims had survived Summary Judgment. Memorandum Opinion states,

> "Defendant' repeats arguments made throughout the proceedings below. Those arguments were either raised or could have been raised in the prior appeals, and were therefore finalized by our prior decisions."

Court failed to recognize that first appeal to determine nature of account could not address all claims. NationsBank was granted Partial Summary Judgment on the Declaratory Judgment; they were entitled to reimbursement of funds they lent to closing, but Court failed to address rights or claims of Petitioner. If finalized by prior appeals, Court should have awarded damages based on the Unfair Trade Practices of ATC.

Bank had the burden of proof, which they did not meet, by failing to produce the federally required documentation. Bank should have had documentation regarding credit extended in Petitioner's name according to 31 CFR 103.33 Records to be Kept and Maintained by Financial Institutions.

Bank may extend credit against real estate that is secured by an interest in the property, however extension of credit against funds does not impose the same regulations or safeguards for the consumer and leads to an inconsistency between Federal and State Laws. Real estate lending by a National Bank is

immune from State regulatory oversight. NBA specifically vests exclusive authority to examine and inspect in the OCC, 12 U.S.C. 484(a). Extension of credit for non-real estate related loans does not require the same restrictions, potentially leading to predatory lending abuses.

Judge denied five motions to compel discovery of records.

ARGUMENT

Lack of Regulatory Oversight

State of New Mexico does not have regulatory oversight of the use of forms as promulgated for use by the Superintendent of Insurance and State Law only requires the underwriters and agents self regulate the use of the proper forms. [NMAC 13.14.18.8 Promulgated Forms] Title 15 Chapter 20, Sec. 1012(b) Federal Regulation of Insurance gives Federal authority to regulate Insurance under Title 15 Chapter 41 of the Federal Trade Commission Act, in areas where the State does not have sufficient regulations in place. In this instance, approved forms for consumer protection were not used and proper FDIC notifications and additional disclosures were not made under Title 12, Chapter 16, and Title Company did not use forms for Insurance Consumer Protection under Sec. 1831X, did not disclose that Insurance could be purchased from another source, in a restriction of trade. Use of Title Company insurance forms which are not forms promulgated for use by the Superintendent of Insurance, is a prohibited practice,[2] which caused significant problems, as this case illustrates, by failing to make necessary disclosures which caused

[2] NMAC 13.14.18.9

misunderstanding in connection with services, which could deceive any person. Petitioner was delivered a binder, believed she was purchasing Insurance. Title Company represented their form as only used to open an interest bearing account, tell people they will benefit from the interest, they are insured, and did not disclose that it was the signature card for the account.

Petitioner made complaints to various agencies, HUD, FDIC, Federal Trade Commission, OCC, New Mexico Department of Insurance and Financial Services, in an effort to obtain records on the account or regulatory oversight. HUD audit, 1999 found operations of Albuquerque Title Company, Inc. to be highly substandard, leading to non-renewal of their HUD contract. FDIC denied jurisdiction. OCC stated they could not intervene. Under Freedom of Information Act, Bank denied having information on the account. Consumer is allowed protections under the law, which gives them the greatest protection.

Bank and Title Company admitted in open Court they acted on behalf of Buyer because he had more "resources," Court erred by failing to recognize Petitioners rights under Federal law, that Title Company violated Title 15 Chapter 41, Sub Chapter V §1692e, False or misleading representations, by misrepresenting the legal status or character of an alleged debt to the Court in Wisconsin, by making false implications that Petitioner had committed a crime in violation of (7) of this subchapter which prohibits the false representation that the consumer committed a crime in order to disgrace the consumer, by representing to the New Mexico Court that Petitioner had lost her claim to the funds or any defense to the debt in violation of 2(A) and by failing to represent to the court that the debt was disputed

in violation of (8) of this sub chapter. Bank violated Title 12, Chapter 16, Federal Deposit Insurance Corporation Sec. 1829b, regarding the retention of records, by failing to maintain records of the identity of persons authorized to act with respect accounts. Title Company represented funds were FDIC insured when Money Market funds are not. ATC violated Title 12, Chapter 16, 1831X Insurance Consumer Protections, by making prohibited misleading or false representations and by failing to make necessary disclosures in the sale of insurance required to be acknowledged by the consumer both orally and in writing according to federal law. Petitioner obtained the substitute W-9 for the Account through NationsBank's telephone banking centers archive, which included the microfiche number for the record. Insured Depository institutions must keep records of the identity of persons maintaining and authorized to act with respect to accounts.[3] Under Federal law, Court should have recognized Petitioner's authority on the account. Court also failed to recognize the validity of Petitioner's electronic signature, which cannot be denied legal effect or enforceability solely because the notice was in electronic form according to Title 15, Chapter 96, Sec. 7001, Electronic Signatures in Global and National Commerce. ATC committed Unfair Acts by extending credit in Petitioner's name without authorization, violated 16 CFR 444.2 Unfair Credit Practices pertaining to Section 5 of the Federal Trade Commission Act by accepting an installment obligation in Interstate Commerce containing a confession of judgment that was not

[3] Title 12, Chapter 16, FDIC, Sec., 1828b Retentions of Records by Insured Depository Institutions

secured by an enforceable security interest and by failing to provide the Insurance as represented. ATC exhibited favoritism to Seller, who submitted instructions to close and Title Company did not require any signatures from Petitioner, which was discriminatory, showed lack of partiality.

In *Watters v. Wachovia*, 500 U.S.__(2007) the National Association of Realtors expressed the concern that the Comptroller has asserted that its powers preclude States from enforcing against national banks and their subsidiaries even those state laws, such as state anti-discriminatory laws, which are not preempted by federal law, and that only the Comptroller may act to enforce those State laws.

Lack of Jurisdiction

NationsBank, N.A., obtained a temporary restraining Order[4] to prevent Petitioner from obtaining funds held in her money market savings account which they claimed would be due to her upon her demand to BNY. After the Order was issued, but prior to the hearing on the matter, at the request of Albuquerque Title, NationsBank, N.A., extended credit in Petitioner's name for use in closing a transaction she was not a party to in violation of the restraining order. See *U.S. v. United Mine Workers of America*, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884, (1947).) restraining Order was entered to protect the courts power to rule.

Petitioner is a resident of New Mexico, was not named, or given notice. Security Firm stated they were not properly served, would motion to quash,

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[4] Title 28, Part IV, Jurisdiction and Venue, Chapter 85 Sec. 1359, Parties Collusively Made or Joined

and complaint failed to state a claim upon which relief could be granted. Bank had indemnified them from liability for damages claimed by Petitioner. Indemnification of liability is against the public policy of the state of New Mexico. The proceeding appeared to be utilized to gain control of the securities so that credit could be extended to close the transaction.

President of ATC, appeared without counsel, and her testimony omitted the fact Petitioner had notified she would not proceed without documentation making her a party to the transaction or that Petitioner's attorney notified her of Petitioner's right to the funds. Petitioner set up a closing on the scheduled date[5] and the parties did not close, instead materially changing the terms of the transaction. Petitioner had qualified for 7% interest 20 year mortgage opposed to the six month 8% interest only real estate installment contract with a balloon due of $873,883 and only 30 day right of redemption.

ATC represented to Wisconsin Court that Petitioner could collect against the equity in the property. Petitioner filed a Lis Pendens based on that representation.

Lack of jurisdiction can be raised at any time in a proceeding. *In re Estate of Baca,* 95 N.M. 294, 296, 621 P .2d 511, 513 (1980) See, *Sniadach v. Family Finance Corp.* 395 U.S. 337, 89 S. Ct. 1820, 23 L.Ed.2d 349(1969) (Notice and prior hearing required or prejudgment attachment violates the fundamental principles of due process.) *Richland County Recreation District v. City of Columbia* 290

[5] Deposition McIntyre P. 33 @ line 25 and P.34 @ line 2, "The first closing...she actually called and set up."

S.C. 93, 348 S.E.2d 64 (1986); (A party's lack of standing as a real party in interest deprives a court of subject matter jurisdiction.)

Petitioner hired an attorney solely to preserve Wisconsin Court's lack of jurisdiction over her. Court of Appeals did not find any violation of Petitioners Due Process rights due to the Wisconsin's Court's lack of personal jurisdiction, stating in Memorandum Opinion No. 25,105 filed October 19, 2005, "an individual represented by counsel is inherently protected from overreaching." Wisconsin Judge asked attorney to comment and she stated without the true party in interest, or any underlying litigation, this was an unconstitutional proceeding.

Petitioner argued on Appeal that Wisconsin Court lacked jurisdiction, failed to require the evidence or testimony required for an injunction, which must describe in detail the reasons for its necessity and there must be a post deprivation hearing. Bank argued Petitioner was precluded from litigating over the funds due to the prior Wisconsin action when she was not a party or in privy with Security Firm who didn't contact Petitioner regarding the proceeding, which affected her property.

Petitioner Motioned to strike affidavit testimony in Wisconsin entered in New Mexico, which was based on hearsay and no evidence. Court took Motion under consideration, never ruled.

Bank argued exigent circumstances because Petitioner planned to move her funds. Security Firm requested Petitioner come in to get a check to "protect" her funds, which Petitioner believes was part of a collusive effort between NationsBank N.A.

and Security Firm[6] to obtain the funds. Petitioner had check writing ability on the account and had no plans to move the funds. Court should have found Wisconsin Court lacked jurisdiction.

Letter sent by attorney for NationsBank N.A. to Petitioner's attorney supported Petitioners contention she was entitled to transfer the funds because he pointed out the document she signed did not have a clause preventing the voluntary or involuntary movement of funds. Wisconsin Jurisdiction was improper, violated Petitioners rights to due process, and was purposely used to circumvent jurisdiction in anticipation of litigation to gain an advantage which affected the outcome of the litigation. Supremacy Clause provides Constitution as Supreme law of the Land; Fourteenth Amendment's Due Process Clause provides:

> No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of Law; nor to deny to any person within its jurisdiction the equal protection of the laws.

Petitioner argued in Appeal No. 25,105,

> "Court of Appeals did not seriously explore the jurisdictional issue created by the original Wisconsin proceeding. The Court of Appeals Opinion conflicts with the U.S. Constitutional Fourteenth Amendment," and "The court of appeals previously found jurisdiction in these proceedings despite

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[6] Title 28, Part IV, Jurisdiction and Venue, Chapter 85, Sec. 1359 Parties collusively Made or Joined

> Petitioner's absence as a party in the Wisconsin litigation initiating all of these proceedings" and, "It was error for the New Mexico Court to find jurisdiction when the Wisconsin Court lacked personal jurisdiction over Petitioner..."

Petitioner also questioned in Appeal No. 25,105 whether the law of the case doctrine could foreclose review of jurisdictional arguments when jurisdiction can be raised at any time.

In the Memorandum Opinion filed October 19, 2005.

> "Showalter never challenged personal jurisdiction in New Mexico...Showalter's argument is that the Wisconsin Court was without jurisdiction to order the $158,813.77 be returned to New Mexico because she was not served and did not have notice of that proceeding...She never appealed that decision to a Wisconsin Appellate Court and now makes that claim as a collateral attack ....We believe that a New Mexico Court could declare rightful ownership of the money as between NationsBank, a Bank doing business in New Mexico and Showalter, a New Mexico resident. Even if we were to accept Showalter's argument that the Wisconsin Order was invalid, she has not presented us with any authority or cogent analysis for her argument that New Mexico's jurisdiction depended solely on the location of or jurisdiction over a specific res"

The issue of Malicious Abuse of Process, Wisconsin Court's lack of jurisdiction over a proceeding which didn't name the real party in interest, violating Petitioners right to due process was raised in the

District Court in Petitioner's answer to the Declaratory Judgment and Counter Claim,

> "**Malicious Prosecution or Abuse of Process**
>
> (70) NationsBank instituted a proceeding in the Circuit Court of Milwaukee County, Wisconsin, (71) The proceeding (in Wisconsin) was without probable cause, without notice to Showalter, and presented a fictions claim (72) That at all times material hereto Everen Securities was authorized to do business within the State of New Mexico, with a Statutory Agent (74) that by filing its claim in the Courts in Wisconsin, NationsBank intentionally attempted to circumvent the jurisdiction of the New Mexico Courts, (75) That by filing its claim in Wisconsin, NationsBank effectively prevented Showalter from a reasonable opportunity to be heard.

Petitioner motioned for a return of her funds on June 8, 2000, as the requirement for prejudgment attachment had not been met, no bond had been provided to secure her rights. Motion was denied.

Judge described Petitioner's amended claims, as a very well-plead complaint, she was considering constructive trust.

> "(I) Breach of Contract (II) Duty of Good Faith and fair dealing, (III) Breach of Fiduciary Duty, (IV) Fraudulent Misrepresentation, (V) Negligent Misrepresentation and Constructive Fraud, (VI) Negligence and Negligence Per se, (VII) Conversion, (VIII) False Light and Defamation, (IX) Malicious Abuse of Process, (X) Unfair Trade Practices, (XI) Prima Facie

> Tort, (XII) Reformation of Deposit Agreement, (XIII) Indemnity and Contribution, (IVX) Constructive Trust and (XV) Unjust Enrichment,

Petitioner included numerous affirmative defenses, including the Statute of Frauds, Failure of Consideration,"

Federal Jurisdiction

NationsBank turned this case into an argument over the ownership and signature authority of a bank account, which is determined by Federal Law and recordkeeping requirements. Question of Federal Jurisdiction was first raised in Petitioners answer and counterclaim,

> "New Mexico statutes 58-1-54 and 58-1-34, NMSA 1978, National Banks, Federal Savings Associations, and Federal Savings Associations and Federal Credit Unions operating in New Mexico are federally chartered and insured depository institutions subject to the jurisdiction of the Federal Government and standard record keeping requirements."

Federal Question of Preemption was also raised in the District Court in the Memorandum in support of Motion for Partial Summary Judgment with Petitioner's arguments that Bank did not meet its burden of proof, "Significantly, NationsBank does not have a signature card as evidence of ownership of the disputed account" and request for production of records clearly governed by Federal law. New Mexico Court did not enforce the request for "in camera" inspection of bank records or the request for records under direction from the OCC to make the request pursuant to the Code of Federal Regulations,

31 CFR § 103.33(b) (e) & 103.34, and in Memorandum in support of Summary Judgment "The Fifth Circuit held that the law is clear that the mere deposit of earnest money into a bank account is not sufficient to create escrow liabilities. *Cf. La Sara Grain Co. v. First Nat'l Bank of Mercedes,* 673 S.W. 2d 558.564 (Tex 1984)"

New Mexico State Court exercised jurisdiction over the case despite fact that NationsBank's declaratory judgment was based on Records required under Federal Law, the case had diversity of citizenship, and the amount in controversy exceeded $75,000.[7]

Wachovia Bank v. Schmidt. 388 F.3d 414 (4th Cir.2004) held that a National Bank is located where it operates branch offices, but it is established where it was chartered for purposes of diversity, therefore the judgment was vacated and remanded with instructions to dismiss for lack of jurisdiction.

Petitioner raised the issue of Federal Records in Motion for Rehearing of the Interlocutory Appeal which argued, "The Account was not founded in the Purchase Agreement," which did not call for the opening of an interest bearing account. Petitioner called the Court's attention to Federal Records reported to the IRS which indicated she was the Owner of the personal money market Account,

> "NationsBank sent Ms. Showalter a personal signature card substitute W-9. This was for account number 002864366166. This form contained Ms. Showalter's social security number as the tax I.D. All of the interest earned on the account was attributed to Ms.

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[7] Title 28, Part IV, Jurisdiction and Venue, Chapter 85, Sec. 1332 (a) Diversity and amount in Controversy

Showalter."

Petitioner also argued that Bank represented she had access to the funds, the Access Identifier Agreement and Disclosure stated,

> "Beginning July 12, 1998 you will be able to transfer funds between accounts using your access I.D. and personal identification number (PIN) NationsBank will link all your NationsBank deposit and personal credit accounts that are eligible unless you tell us otherwise"

Court of Appeals failed to recognize that Petitioner made Counter Claims and Cross Claims Court stated,

> "As to Section 58-1-7, Showalter does not state her basis for claiming the applicability of that section to NationsBank. It relates to the necessity of certain action on the part of a person making a claim to a deposit with a bank, not to a lawsuit brought by a Bank."

Court of Appeals stated, "A signature card for the account was not produced."

One of Petitioner's claims against NationsBank was Breach of Contract for bringing suit in Wisconsin, not the jurisdiction required in the Depository Agreement. Court of Appeals stated, "There was no Depository Agreement between NationsBank and Showalter with regard to the account in Question,"

Two hearings were held on January 6, 2003. NationsBank N.A. stated, "We did not produce the back of the signature card, your honor."

Court of Appeals stated,

> "We recognize that NationsBank did have Showalter's documentation connected to the account, including her social security

number and W-9 Form and had taken action consistent with her ownership of the account. Such facts may arguably indicate that Showalter was entitled to payment from the account in other circumstances. However this account was an escrow account, and the evidence that Showalter presents does not demonstrate that NationsBank had any knowledge that she was entitled to escrow proceeds".

Decision was contrary to Abundance of Evidence in Petitioners Favor

Decision in this case was not based on the abundance of evidence, which should have given Petitioner rights under Federal Law. Bank brought a Declaratory Judgment Action in New Mexico, which found NationsBank N.A. was the Owner of the funds, and that this account was an Albuquerque Title Account, although NationsBank N.A. refused to produce the signature card, in violation of Federal Record Keeping requirements; Ownership is established upon opening the account. The Court refused to consider evidence of Bank Records. NationsBank N.A. statement of 12/26/97 states, "You enjoy unlimited withdrawals and transfers at ATM's and Teller Windows, However, remember Federal law only allows six withdrawals." Virginia McIntyre, Title Agent, testified the form Petitioner signed was the signature card.

ATC had knowledge from the inception that Petitioner had not been made a party to the transaction.[8] NationsBank did not produce any agreement with the Title Company regarding this

[8] Deposition Monroe, Albuquerque Title, pg. 43 @ line 10-11

account. Title Company did not have a duly authorized power of attorney over the account. The money was withdrawn by the Title Company sending a letter asking NationsBank to close their (Petitioner's and Buyer's) accounts and issue Albuquerque Title a Check showing Petitioner as the remitter of $318,705. The funds were removed by signing Petitioner's name, which they misspelled, to a counter withdrawal slip.[9] Petitioner's attorney argued that under that theory we could all be removing funds from accounts of others.

Court did not consider notes from the Vice President of Security for NationsBank N.A., which stated that Bank records show "Showalter is the owner of two checking accounts." Testimony by a Former president of three title Companies stated, "ATC should never have taken funds which did not correspond to a purchase contract, "the documents indicate that the Funds of Ms. Showalter and Midwest Acquisitions, Inc. were wrongly commingled under Ms. Showalter's name," and, "Albuquerque Title never should have closed, recorded and disbursed this transaction using Ms. Showalter's funds" and should have required documentation evidencing Ms. Showalter's agreement to new terms.

Unfair Trade Practices

There was abundant evidence that the Title Company made false representations and omissions to Petitioner, in connection with the sale of services or extension of credit by stating that a transaction

[9] Counter Withdrawal Slip attached to Petitioner's Motion for Further Relief pursuant to the Declaratory Judgment Act, or for Relief under the Mandate of Court of Appeal's for damages under the Unfair Trade Practices Act

had rights it did not have, by failing to provide the insurance contracted for, by misrepresenting that funds were FDIC insured, [NMSA 57-12-2(D)(1-17)] Unfair Trade Practice Claims were clearly raised in the District Court Cross Claims that the actions of ATC in the unauthorized advance of funds to a closing in a distant jurisdiction with no notice or opportunity to be heard which resulted in no valid title to Petitioner resulted in a gross disparity between the value received and the price she was forced to pay."[10] Court of Appeals recognized that Petitioner argued Unconscionable Trade Practices; any person damaged under this Statute compensated for three times actual damages plus attorney fees Title Company made misrepresentations and omissions to the Wisconsin Court by failing to reveal that Petitioner had notified she would not proceed without the necessary documentation promised to recognize her interest in the property or that Buyer and Seller had agreed to new terms. Petitioner had not received any objections from the Parties to her withdrawal from the transaction and Albuquerque Title did not produce any conflicting demands on them.

New Mexico Court of Appeals Memorandum Opinion, March 20, 2002 found the question of whether there were two accounts to be a question of material fact, Court of Appeals stated,

> ("creation of a separate account for Showalter") would be stating that a transaction has rights that it does not have

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[10] Uniform Unfair Trade Practice Act NMSA 57-12-2(E) (2) Unconscionable Trade Practice Unfair Trade Practice which results in a gross disparity between the value received and the amount paid

and was a material fact as to whether ATC failed to deliver services that it contracted with Showalter for.[11]"

In violation of the New Mexico Administrative Code, Albuquerque Title did not require written escrow instructions signed by all parties and disbursed funds without agreement of all parties NMAC 13.14.4.8(A) disbursed funds when there weren't available funds NMAC 13.14.4.8(E), failed to deliver to each party a statement of the receipts and disbursements made by or on behalf of each party to the escrow NMAC 13.14.4.8(G), and failed to act with impartiality as it relates to any party to an escrow in the disbursement of funds NMAC 13.14.4.8(H). The form used by the Title Company was not a form promulgated for use by the Superintendent of Insurance, did not contain any restrictions on moving the funds, had no term and did not describe a property. Title Company placed the name of the Buyer on the form in violation of NMSA 58-22-26 which forbid them to fill in any blanks, which should be filled in by the consumer. Title Agent testified their addition of the name of the Buyer on the form was just the name of the file generally.[12] Form did not disclose the right to purchase insurance from another source.

Title Company did not deliver a Title Policy to Petitioner after delivering a Binder, and made omissions and misrepresentations regarding the nature of the account and the transaction.

Under valid escrow, strict compliance would only require $25,000 under the terms of the document signed by Petitioner. There was no written escrow

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[11] Deposition McIntyre, pg. 54 line 2 There's two of these

[12] Deposition McIntyre, Albuquerque Title, pg. 53 @line 25

agreement signed by all parties to the transaction. Title 15 Chapter 41 Sub Chapter V 1692f Unfair Practices does not permit the collection of any amount not expressly provided for in the agreement "creating the debt."

Declaratory Judgment

Principal characteristic of the Declaratory Judgment is that it declares preexisting rights of the parties without a coercive decree. Decision of the Court ordered NationsBank N.A. be reimbursed money they lent to the Title Company in Petitioners name, for use in the transaction even though Petitioner did not receive an interest in the Title. Wisconsin Court directed rights of parties be determined.

Declaratory Judgments are to be used in matters of actual controversy. A depositary is not technically a trustee since a depository does not have legal title to the subject matter. Declaratory Judgments are to permit parties to a controversy to declare rights, status and other legal relations under wills, deeds, or contracts. Court of Appeals finding that Bank did not have an agreement with Petitioner on this account raises the question of NationsBank's use of Declaratory Judgment in this case. Bank collected overdraft fees from Petitioner and charged maintenance fees when account was purported to be an Albuquerque Title Account in violation of Title 15 Chapter 41, 1692f Unfair Practices, extending credit against Petitioner's funds was a non-judicial action, which caused dispossession of property without notice to Petitioner.

Title 12—Banks and Banking Chapter I, Comptroller of the Currency, Department of

the Treasury 12CFR7.4008Sec Lending (b) Standards for Loans states that a Bank shall not make a loan based predominantly on Bank's realization of the foreclosure or liquidation value of the borrower's collateral, without regard to the borrower's ability to repay the loan according to its terms. [Title 15 Chapter 41 Sub Chapter V, 1692f Unfair Practices] A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law. (6) Taking or threatening to take any non-judicial action to effect dispossession or disablement of property if— (A) there is no present right to possession of the property claimed as collateral through an enforceable security interest; (C) the property is exempt by law from such dispossession or disablement.

Closing the transaction while an Order was in place protecting the funds was a violation of a Court Order and the right to insurance should apply. Oral contract for insurance between insured and agent of company is enforceable. *Harden v. St. Paul* 51 N.M. 55 178 P.2d 578 (1947)

Judge ruled in open Court "I've reviewed the pleadings, affidavits, documentation.... I think it was clear all along that she was saying she had a

deal with Albuquerque Title and that they were not going to take her money. The Oral Agreement is Plead."[13] Petitioner argued the terms of the agreement with Albuquerque Title weren't fully integrated under the Parol Evidence Rule which cannot be used to contradict the written agreement, but can be used to explain course of dealing, to show unconscionable terms, illegality, or fraud. Title Agent testified it was not unusual for someone to fund a transaction before becoming a Party.[14] She also stated she only closed the transaction because she was told to.

Buyer purchased an Owners Insurance policy. Petitioner requested payment on insurance policy and Title Insurer refused payment stating there was no record of Petitioner or her funds. Security Escrow, who opened escrow after the closing, also had no record of Petitioner's funds being used in the transaction.

Procedural Improprieties

Procedure in this case deviated from the norm. Buyer defaulted on the property before the Court ruled; Court failed to advance Declaratory Judgment on the docket.

Courts Order of October 26, 1999 granted Summary Judgment to NationsBank, and granted Summary Judgment to Petitioner on the majority of her claims. Order was revised on November 15, 1999 granting Bank Partial Summary Judgment on their claim, dismissing all Petitioners claims except defamation. Judge was undergoing full chemotherapy and seemed confused. Petitioner

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[13] See Appendix, Portions of Transcript CV-98-11599, 2/01/01

[14] Deposition Virginia McIntyre, Albuquerque Title, Pg.47 @ line19

raised the issue with the Court of Appeals mediator, who responded that she needed the time for her retirement.

Petitioner's Motion for Reconsideration was granted. Bank argued "Mistake" in response. Prior to the Injunction, Petitioner changed position in reliance of the fact that she had notified the Parties she would not close without necessary documentation making her a party and received no objection. Seller's attorney contacted Petitioner to obtain approval of language Buyer and Seller wanted to use in a real estate contract, which would allow Midwest, at their sole option, a one-time right to assign the debt to Petitioner or an entity in common with Petitioner and Midwest. Petitioner stated she was no longer participating and did not agree to close with a real estate contract. Court of Appeals stated, "The pivotal issue in this case is ownership, not Showalter's understandings or NationsBank's incorrect representations."

Court allowed Bank to move for second summary judgment on claims, which had survived Summary Judgment Petitioner's attorney argued in Response to NationsBank's Second Motion for Summary Judgment that the threat of prosecution in the alleged collection of a debt was a violation of Federal law.

Petitioner's attorney argued on Appeal, No. 27,098 to New Mexico Supreme Court,

> "The Court of Appeals decision to affirm the trial court's order on Declaratory Judgment without settling the question of the rights of all the Parties is contrary to the Declaratory Judgment Act" and; "These issues are all

> issues of substantial public interest affecting litigants pursuing unfair practices act claims and issues of jurisdiction or law of the case in the Court's of appeals."
>
> "Thus, this Petition is based on conflicts with clearly established law and issues of substantial public interest."

The presence of substantial evidence should have disposed of the Unfair Trade Practice, Malicious Abuse of Process and commingling claims at the minimum, as there was an abundance of evidence in Petitioners favor.

Court ignored the law of the case doctrine and the original Memorandum Opinion finding Petitioners claims due to Unfair Trade Practice of ATC. Petitioner opposed the disposition because it failed to grant damages for an unconscionable trade practice or to revise the decision as manifestly unfair based on new evidence, or to determine rights or status under declaratory judgment.

Remaining claims were sent to arbitration, contrary to local rule on arbitration, certifying that no party is seeking more than $25,000 in damage. Litigation was well developed and it was not more convenient, less costly forum, or Title Arbitration. Arbitrator found decision for NationsBank N.A. should have been overturned, but stated that would have to be done by the Court because Bank was not ordered to Arbitration.

ATC motioned to be dismissed from the case; Court denied the motion; ATC failed to settle with Petitioner after their liability was clear.

There was a change in the Judge in this case at a very late date.

Title Company stated Petitioner was entitled to a return of her funds, but that she had not obtained

prior authorization to obtain them. President of ATC represented to Court that they acted as partial escrow company.[15] New Mexico law prohibits anyone from stating they are in the escrow business unless they are a licensed escrow company.

Title Company withheld the Purchase Agreement from the FBI through the second summary judgment. Petitioner was pregnant when Bank froze all her funds, not just the disputed amount. Petitioner's attorney learned FBI had not been provided the Purchase Agreement, which he provided, and FBI determined Petitioner had not misappropriated funds.

This case is similar to *Brentwood v. Tennessee Secondary School 'Athletic Association v. Academy,* 262 F. 3d 543 (6th Cir.2001) which found that the TSSAA board improperly considered exparte evidence thereby violating Brentwood's due process rights. New Mexico Court's finding that Petitioner had already litigated and lost her claims in a proceeding she was not a party to, where no evidence was presented, violated Petitioner's due Process rights.

Buyer and Sellers agreement to close with a six month 8% interest only installment contract with balloon payment of $873,883 and only 30 day right of redemption using Petitioner's funds, was a form of predatory lending.

Seller did not notify Petitioner of Buyers default until after the time for redemption had passed; when Seller finally notified, they would only allow Petitioner to cure in the Buyer's name, preventing her from obtaining financing necessary to mitigate

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[15] Transcript, Wisconsin Circuit Court Hearing November 23, 1998

her damages.

Wisconsin Court directed Seller join this litigation if they wished to protect their rights. Seller did not join, instead sued Petitioner for Quiet Title in response to Lis Pendens filed in this case, and did not name Buyer in the litigation. Petitioner Motioned the Court to consolidate the cases. Motion was denied.

Buyer testified in this case that Seller would not recognize the Petitioner's interest in the title. With knowledge that Petitioner was tendering earnest money, it was discriminatory for the Seller to arrange with the Buyer to act as the Lender and refuse to recognize Petitioner's interest in the title or entity taking title.

Petitioner was ordered by Judge in CV2000-1089 to sign a collateral substitution. Seller failed to place money in Court registry, sold the property with Lis Pendens in place. New Judge granted Seller the Property, money, and damages after Petitioner had signed the release as ordered.

Court failed to recognize Petitioners rights as a consumer to void a disabling civil dispute clause. NationsBank's refusal to participate in the Arbitration, denied Petitioner the possibility of reversal of the decision or collecting legal fees arising out of the standard title company form, which did not contain any clause preventing the movement of funds. Petitioner also argued New Mexico Supreme Court found rights of a consumer to have Unfair Trade Practice claims against a Title Insurer be judicially determined. [Lisanti v. Alamo Title Ins. of Texas, 2002-NMSC-032, 132 N.M. 750, 55 P.3d 962]

Decision in this case Differs from Other State Courts of Last Resort And Federal Courts

The decision in this case differs from final Decisions in other State and Federal Courts, which have found that "Mere deposit of money into bank account is not sufficient to create escrow contract or create escrow liabilities." *Bank One Texas N.A. v. Taylor*, 970 F.2d 16, certiorari denied 113 S.Ct. 2332, 508 U.S. 906, 124 L.Ed.2d 243. "Merely characterizing an account as an "escrow account" does not render it so, under Massachusetts law." *Mercurius Inv. Holding, Led. V. Aranha,* 247 F.3d 328. And the Utah Court found that Escrow is not trust in strict sense of word because escrow agent does not hold legal title to escrow to property. In re, *First Capital Mortg. Loan Corp.*, B.R.462, reversed 872 F.2d 335, rehearing granted, Opinion vacated on rehearing en banc 917 F2d 424, rehearing denied, affirmed 917 F.2d 424, rehearing denied. Wisconsin Court also held that merely labeling a specific delivery of property as "escrow" does not make it such, nor will the misuse of the term in designating instrument necessarily make it an escrow. In re *ANR Advance Transp. Co., Inc.*, the Northern District of California found that the McCarran Act, which delegates "business of Insurance" to States, does not authorize state regulation of escrow services even if performed by insurance companies [*United States v. Title Insurance Rating Bureau of Arizona,* 700 F.12d 1247 (9th Cir.1983) and *Citicorp Services, Inc. v. Gillespie*, 712 F. Supp. 749.]

Escrows are to hold funds until a specified event, although the grantor retains the right to repossess property if specified conditions do not occur.

Bank argued that the funds were non-refundable under the contract, however, NationsBank, N.A. admitted, "earnest money is generally refundable."

Stoneking v. Bank of America, N.A., 132 N.M 79, 43 P.3d 1089, argued by Bank's attorneys, found that Federal law preempts the State with regard to National Banks authority to collect prepayment penalties on mortgages disallowed under State law and this case should find that Federal Law should preempt the State for numerous reasons cited throughout including Title 15, Chapter 20 1012(b) which preempts the State with regard to the Regulation of Insurance in areas where State lacks oversight because Policies, Endorsements, Binders, Commitments, Certificates, Closing Protection Letters, Notice of Availability of Owners Title Insurance and Facultative Reinsurance Agreements are not to be filed with the Superintendent for approval as the responsibility rests upon the title underwriting companies to see that only standard promulgated forms are used by themselves and their authorized agents to insure interests in New Mexico property [NMAC13.14.18.8 PROMULGATED FORMS] *Heritage Ins. Co. of America v. First National Bank of Cicero* 629 F Supp. 1412 found that fiduciary breach against Bank existed when Bank was prohibited by fiduciary duty from setting off moneys in escrow for its own benefit, to withstand motion to dismiss.

Also, *Gray v. England* 69 Wash. 2d 52, 417 P .2d 357 (1966) found that a new contract by which a different relationship is established between the parties necessarily terminates the deposit. The decision in *Gray v. England* No. 37971 Supreme Court of Washington Dept.2, conflicts with the

decision in this case. It held that a Title Insurer acts as an agent until true escrow comes into being and that the Title Company was unable to close a transaction without appropriate documentation and escrow instructions; Gray as a third-party creditor beneficiary, had enforceable rights against the party who acted with apparent authority to deal with his earnest money.

Recent case in New Mexico conflicts with the decision in this case, most recently, *Barrington Reinsurance Limited LLC v. Fidelity National Title Insurance Company*, 2007 NMCA 147; 2007 N.M. App. Lexis 125 which found that claims against a Title Insurer brought under the Insurance Code extend beyond the duty of a title insurer or its agent to conduct a reasonable search and examination of the title, but applies to other duties arising under other statutes such as Negligent Misrepresentation, implied Breach of Contract, violation of the Unfair Practices Act.

ATC or Bank should have disclosed the record of Petitioner's security entitlement.

Court of Appeals found Petitioners loss was due to the lack of performance by her and her "Partner" despite the fact that there was no partnership[16] and Petitioner could not obtain financing without having an interest in the title.

New Mexico Court ordered Petitioner to pay NationsBank N.A. legal fees.

Petitioner posted a bond, and Judge signed off Bond was properly posted. Bank objected Bond was not properly posted; motion was granted. Bond was a CD in amount to satisfy Bank, signed by Compass

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[16] Deposition Carolyn Monroe, ATC, Pg. 43 @ Lines 10-11

Bank Vice President, could not be accessed without Order of the Court. Court of Appeals issued an order that Bond needed to remain posted, making funds unavailable to satisfy NationsBank, Bank garnished Petitioners securities from Wachovia, who issued a check to NationsBank.

Petitioner appealed decision; agreement provides for fees, "in connection with overdrafts except to the extent they are caused by our fault." Bank admitted in their Complaint and answer to Counterclaim # 41, they advanced funds in the form of an overdraft.

Court found ATC had no fiduciary duty to Petitioner, only to Buyer and Seller, however, Petitioner argued in the Opposition to the Proposed Disposition that the finding is contrary to a New Mexico Attorney General Opinion, which states that a title company taking any funds of others has a fiduciary duty to them.[17]

Petitioner recognizes *pro se* pleadings are not favored; however, this case has had a tremendous financial impact. This Petition should be accepted and Petitioner will retain legal counsel to properly represent her in this Court.

Petitioner lost compensatory damages; any value from the $158,817 used to close the transaction, has paid in excess of $300,000 in legal fees in addition to approximately $135,000 for NationsBank's legal fees.

SUMMARY

This case merits review of a violation of public policy, which allowed a Bank to indemnify the liability of a Security Firm from damages to

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[17] New Mexico Attorney General Opinion No. 87-30

Petitioner, contributing to a decision, which was not based on substantial evidence and not fundamentally fair. Petitioner's Security Firm shared financial information against privacy laws, failed to defend, and did not ensure that the real party in interest was in front of the Court.

This case qualifies for review of the improper use of the legal system, which allowed Parties to gain an advantage in anticipation of suit without regard for individual rights guaranteed by the constitution. Title Companies request to have credit extended against funds protected by a Court Order should be contempt of Court. Albuquerque Title's refusal to tender the funds or honor insurance should constitute Conversion. Seller's refusal to recognize Petitioner's interest was discriminatory and partial to the Buyer.

This proceeding exemplifies problems arising from improper jurisdiction or State litigation which includes issues preempted by Federal law such as recordkeeping required by Federal law, the enforcement and regulation of the New Mexico Department of Insurance in areas not overseen by the State, relative to Notifications required to be made by Title Insurers and their Agents as Required by FDIC and in Insurance Consumer Protection if it provides greater protection for the Consumer Than State Laws and Regulations with regard to Financial Records, which provide for finality of funds transfers, and the Acceptance of Electronic Records.

The issue of property rights and their treatment by the Courts, rights guaranteed by the Constitution, predatory lending, rights associated with Electronic Funds Transfers, and Unfair and Unconscionable Trade Practices by affiliated entities which deny equal protection under the laws and deprive people

of property are of important national interest.

A number of provisions beg for the review of this case; Writ of Certiorari recognizes this Court's responsibility to ensure that Circuit Court's stay within the boundaries of accepted and usual course of judicial proceedings, ensure other courts don't sanction such departure; Court should be compelled to review this case for violations of due process which aided in deprivation of property. Court should be compelled to exercise supervisory power over a case plagued with procedural improprieties; Court which could not enforce discovery of records or Insurance documentation required to be maintained by Federal law; allowed briefing after briefing was closed; failed to join indispensable Parties; where jurisdiction was contrary to relevant decisions of this Court; and whose decision differs from decisions of other courts of last resort on the subject; Court should be compelled to review this case for Lack of ethics of Parties who refused to produce documentation with knowledge that NationsBank N.A. did not have signature card, allowing waste of judicial resources, time, and expense.

Claims should not be dismissed unless there is no set of facts upon which to grant relief.

Petition for Writ of Certiorari is warranted as the scope of review allows review of a decision which affected fundamental or substantial rights of a person, as it was manifestly unjust to allow Parties to use Petitioners funds in a transaction she was not a party to and per Congress' intent to prevent predatory lending, unfair debt collections and to promote fair settlement procedures.

This decision calls for this Court's exercise of its supervisory power over the New Mexico Department of Insurance who did not regulate the use of the

proper forms, and a Court which ignored damages when the elements of claims were clearly defined such as Malicious Abuse of Process and the Unconscionable Trade Practice Claim; that the actions of NationsBank N.A. and Title Company in the unauthorized advance of funds to a closing in a distant jurisdiction with no notice or opportunity to be heard resulting in no legal title to Petitioner, resulted in a gross disparity between the value received and the price she was forced to pay.

Petitioner requests this Court to accept the Petition for Writ of Certiorari to recognize Petitioners rights as a consumer, determine rights under Federal law, or award Petitioners statutory damages under the Unfair Trade Practice Act based on overwhelming evidence; or declare rights or status as an insured under the Declaratory Judgment Act as a claim for relief may be awarded by a Court of the United States with the power and jurisdiction to grant the relief. [18] Final judgment rendered by a State Court of last resort, which failed to award statutory damages for Unconscionable Trade Practice, may be reviewed by Supreme Court by writ of certiorari where any title, or right, is claimed under the Constitution or statutes of the United States.

Respectfully Submitted,

"s"/Susan B. Showalter
Susan B. Showalter, *pro se*
9809 Greenbrier NE
Albuquerque, New Mexico, 87111-7451

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[18] TITLE 28, PART VI, CHAPTER 151
§ 2201. CREATION OF REMEDY

APPENDIX

[October 22, 2007]
THE SUPREME COURT OF THE STATE OF NEW MEXICO
No. 30,602

NATIONSBANK N.A.,
Plaintiff-Respondent,
v.
SUSAN SHOWALTER,
Defendant-Petitioner.

ORDER

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and response, and being Sufficiently advised, Chief Justice Edward L. Chavez, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Petra Jimenez Maes, and Justice Richard C. Bosson concurring;

NOW, THEREFORE, IT IS ORDERED that the petition for writ of certiorari is denied in Court of Appeals number 27098.

IT IS SO ORDERED.

WITNESS, The Hon. Edward L. Chavez, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 22nd day of October, 2007

"s/" Madeline Garcia
Madeline Garcia, Chief Deputy Clerk

[Seal Attest a TRUE COPY
"s/" Esther Vigil
.Clerk of the Supreme Court
Of the State of New Mexico]

[COURT OF APPEALS OF NEW MEXICO FILED JUN 20, 2007, No. 27,098]

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

NATIONSBANK, N.A.,
Plaintiff-Appellee,

v.

No. 27,098

SUSAN B. SHOWALTER,
Defendant-Appellant,

And

ALBUQUERQUE TITLE COMPANY, INC., and MIDWEST ACQUISITIONS, INC.
Defendant-Appellees,

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY,
Linda M. Vanzi, District Judge

Modrall, Sperling Roehl, Harris & Sisk, P.A.
William R. Keleher
Albuquerque, NM
For Appellee NationsBank, N.A.

Susan B. Showalter
Albuquerque, NM
Pro se Appellant
Raymond B. Sanchez Law Offices
Frederick M. Mowrer
Albuquerque, NM
For Appellee Albuquerque Title Co.

Rubin, Katz, Salazar, Alley & Rouse, P.C.
Owen C. Rouse
Santa Fe, NM
For Appellee Midwest Acquisitions, Inc.

MEMORANDUM OPINION

ALARID, Judge.

Defendant, *pro se,* appeals from the trial court's order entering judgment on attorney fees and denying Defendant' request for further relief under the Declaratory Judgment Act and Mandate of this Court. We proposed to affirm based on the "law of the case" doctrine. Defendant filed a memorandum in opposition to our Calendar Notice. We have reviewed Plaintiff's arguments but we are not persuaded by them. We therefore affirm.

We issued two prior opinions in this case. In 2002, we held that the summary judgment order entered in favor of Albuquerque Title Company (ATC) should be reversed. In August 2003, the claims between ATC, Midwest Acquisitions, Inc., and Defendant were sent to binding arbitration, and all of the claims made by Defendant against ATC and Midwest Acquisitions, Inc. were dismissed. [Supp.RP 2899; 2773] After Plaintiff successfully moved for summary judgment against Defendant and was awarded attorney fees, Defendant appealed raising numerous issues involving all of the proceedings up to that point. In our second opinion, issued in October 2005, we affirmed on all issues raised on appeal by Defendant, including those related to arbitration,

jurisdiction, the grant of summary judgment in favor of Plaintiff and the award of attorney fees. [Supp.RP 2759-75] We remanded the case for the limited purpose of requiring the trial court to determine the amount of fees related to the interlocutory appeal and subtract those fees from the attorney fee award. At that time, Defendant filed her motion for further relief under the Declaratory Judgment Act and the mandate of our 2002 opinion. [Supp.RP 2844] The trial court recalculated the attorney fees and denied Defendant's motion. [Supp.RP 2910] Defendant appeals from that decision.

Although the only issue determined by the trial court's latest order concerned the recalculation of attorney fees, Defendant does not challenge the trial court's decision on that issue. Instead, as in her motion for further relief, Defendant repeats arguments made throughout the proceedings below. For example, included in the lengthy memorandum in opposition filed by Defendant are arguments with regard to the underlying judgment, the arbitration decision and the summary judgment entered in favor of Plaintiff. [DS 2; Supp.RP 2897] Those arguments were either raised or could have been raised in the prior appeals, and were therefore finalized by our prior decisions. See Farmers' State Bank v. Clayton Nat'l Bank, 31 N.M. 344, 353,245 P.543, 547 (1925) (determining that "law of the case" means that the law applied in an appeal is binding on remand and also on the appellate court in a subsequent appeal; the doctrine also applies to those arguments that could have been raised in the first appeal). As discussed in our calendar

notice, although application of the "law of the case doctrine" is discretionary, there is nothing to indicate that the prior decisions were erroneous. Therefore, we decline to exercise our discretion to apply the doctrine in this case.

For the reasons discussed above and in our calendar notice, we affirm the decision of the trial court.

IT IS SO ORDERED.

"s/"A. Joseph Alarid
A. JOSEPH ALARID, JUDGE

WE CONCUR:

's/"Ira Robinson
IRA ROBINSON, Judge

"s/" Roderick T. Kennedy
RODERICK T. KENNEDY, Judge

[Court of Appeals filed April 17, 2007]
IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

NATIONSBANK, N.A.,
Plaintiff-Appellee,
vs
No. 27,098
Bernalillo County.
CV-98-11599

SUSAN B. SHOWALTER,
Defendant-Appellant

and

ALBUQUERQUE TITLE COMPANY, INC.
And, MIDWEST ACQUISITIONS, INC.,

Defendant-Appellees,

NOTICE
PROPOSED SUMMARY DISPOSITION

You are hereby notified that the:
Supplemental Record Proper
Was filed in the above cause on December 1, 2000.

This case has been assigned to the **SUMMARY CALENDAR** pursuant to Rule 12-210(D) NMRA

Summary affirmance is proposed.

Note: This is a ***proposal*** of how the Court views the case. It is not a final decision. You now have twenty (20) days to file a memorandum

telling the Court any reasons why this proposed disposition should or should not be made.

See Rule 12-210(D) NMRA

Issue: In prior proceedings involving Plaintiff and Defendant, Plaintiff filed a claim against Defendant for reimbursement of funds and was awarded summary judgment on that claim. Plaintiff was also awarded attorney fees and costs. Defendant filed an Interlocutory appeal of that decision with this Court. This Court affirmed the trial court's order, but found that the parties would pay their own fees for the purposes of the interlocutory appeal. Plaintiff applied for attorney fees in the trial court and was awarded fees of over $101,000. Defendant also appealed that award to this Court. This Court affirmed the award of attorney fees and costs incurred by Plaintiff in obtaining reimbursement of the funds, but reversed the award of fees related to the interlocutory appeal.

Therefore, after two opinions issued by this Court, the trial court was faced with the task of calculating the fees related to the interlocutory appeal and subtracting those fees from the total award. In addition, after this Court issued its second opinion, Defendant, filed a motion for further relief under the declaratory judgment act and mandate of the Court of Appeals. In its Order, the trial court calculated the amount of fees to be awarded to Plaintiff based on our mandate, and denied Defendant's motion.

Defendant does not appear to claim that the trial court's calculations were incorrect with regard to the attorney fees that should be awarded based on our mandate, and denied Defendant's motion. Instead, in both her motion filed below and in her docketing statement, Defendant includes arguments and facts relating to proceedings that occurred prior to the time our two opinions were issued. Among other arguments, Defendant includes argument in her docketing statement regarding the original funds taken from Plaintiff's bank, a proceeding in Wisconsin that allegedly occurred prior to the New Mexico proceedings, arbitration proceedings held in 2003, a declaratory judgment action allegedly filed in 1998, and the posting of a bond connected to the original judgment. Defendant states that she is not seeking review of our prior decisions as much as [she] seeks a review of the award of damages" for damage to her "reputation and loss of business." [DS 29] Despite Defendants claims that she is not seeking review of our prior decisions, our reading of her docketing statement indicates otherwise.

We propose to hold that the "law of the case" doctrine applies to Defendant's appeal. Under the "law of the Case" doctrine, the law applied in the first appeal of a case is binding on a trial court on remand and also on this court in the event of a subsequent appeal. *See Farmer's State Bank v. Clayton Nat'l Bank,* 31 N.M.344, 353, 245 P.543, 547 (1925). The doctrine also applies to issues that could have been raised in the former appeal. *Id.* "[O]nce a particular issue in a case is settled it should remain settled." See State v. Breit, 1996-

NMSC-67, ¶ 12,122 N.M. 655 930 P.2d 792(citations omitted). In other words, under the "law of the case" doctrine, Defendant cannot raise issues in this appeal that were already set to rest by our prior decisions. Based on the "law of the case" doctrine, we propose not to address Defendant's arguments and to affirm the trial court's decision with regard to attorney fees and to Defendant's motion.

We recognize that the "law of the case" doctrine is discretionary and will not be applied if a decision is erroneous and should be disregarded. See Trujillo v. City of Albuquerque, 1998-NMSC-031, ¶ 41,125, N.M. 721, 965 {/2d 305 (citations omitted). However, there is nothing to suggest that the underlying decisions in this case were erroneous. Therefore we propose to affirm the trial court's decision.

's/' A. Joseph Alarid
A. Joseph Alarid, Judge

(Transcript Companion Case CV-2000-1089
COA 25,783, February 27, 2003)
SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

WELLS FARGO BANK, N.A. f/k/a
FIRST SECURITY BANK OF NEW MEXICO, N.A., Trustee of the 401(k) Profit Sharing Plan for EYE ASSOCIATES OF NEW MEXICO, LTD.,
Plaintiff-Appellee,
vs. Volume 2 of 4
SUSAN B. SHOWALTER
Defendant-Appellant,

HONORABLE ROBERT H. SCOTT, Judge of the Second Judicial District, State of New Mexico, Division XIII.

The Plaintiff-Appellee, appearing by Counsel of Record, Mr. Richard M. Reidy, Attorney at Law, Suite D, 4010 Carlisle NE, Albuquerque, New Mexico 87107
The Defendant-Appellant, appearing in Person and by Counsel of Record, Mr. Joseph Kennedy, Attorney at Law, Suite 250, 420 Central Avenue, Southwest, Albuquerque, New Mexico 87102;

THE COURT: Have a seat please. I'm sitting in for Judge Schneider who's away on military leave. Matter before the Court is direct compliance with the form of the stipulated Order, and I have read the Motion. ...I'll ask, just simply going to Mr. Kennedy, what is the problem in getting it signed so they can close?

MR KENNEDY: Well, the problem is, Judge, that the Order provides for Ms. Showalter to sign the release when the money is deposited in the court registry. There has been no money deposited the court registry, so Ms. Showalter is reluctant to, without anything having been deposited in the court registry.

.....

MR KENNEDY: ...—first they're asking for the Court to do something different than what we agreed to previously, and also this is an agreement two years ago contemplating – apparently contemplating a sale then. There's been no interest paid since that time, so that's a concern of my client's as well. So I think that the Eye Associates is trying to - s trying to go about this a different way than the agreed order and not compensating my client in any way for – the interest is the other concern we have here.

THE COURT: How would you have him do it?
MR KENNEDY: Deposit $158,813.77 with the Court, and Ms. Showalter will be required under the order to release the lis pendens.
THE COURT: I'm going to order and direct that she sign it today and give it to you, and then you can hold it, and if you want to personally attend the closing, Mr. Kennedy, you can do that if any of this—I listened in detail to the letter of instructions to the title company, If that's not satisfactory, you can attend the closing personally.
..... THE COURT: .....Her interest is getting her money, and your interest is getting it sold, and you all can work together for the common goal. If you have residual claims after that regarding this

interest issue, you can take that up with Judge Schneider.

THE COURT: She wants it closed, too, because she wants her money.....Like I say, if you have any residual issues afterward, you can talk to Judge Schneider about that.

[Filed October 11, 2002]
SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

NATIONSBANK, N.A.,
Plaintiff,

No. CV 98-11599

vs.

SUSAN B.SHOWALTER, ALBUQUERQUE TITLE COMPANY and MIDWEST ACQUISITIONS,
Defendants,

JUDGMENT ON MANDATE

On March 20, 2001, this Court entered an Order granting Summary Judgment for Plaintiff NationsBank on its Complaint for Declaratory Judgment and for NationsBank on Defendant Showalter's counterclaims except as to the Unfair Trade Practice Act and except for Showalter's counterclaim for malicious abuse of prosecution. On April 3, 2001 this Court entered an Amended Order granting Albuquerque Title Company ("ATC") partial summary judgment against Defendant Showalter. Defendant Showalter ("Appellant") filed her Notice of Appeal of the Summary Judgment orders by separate pleading on or about April 3, 2001.

On March 20, 2002, the New Mexico Court of Appeals filed its Opinion affirming the judgments of the District Court as to the granting of summary judgment to NationsBank and to ATC and reversed the District Court in its grant of

summary judgment to ATC on Showalter's cross claim under the Unfair Practices Act. Mandate was issued by the New Mexico Court of Appeals on May 15, 2002. The Mandate notes that the District Court's original decision is now final.

The Mandate of the New Mexico Court of Appeals remands this cause to this Court for further proceedings consistent with its decision.

"s/"Susan M. Conway
HONORABLE
SUSAN M. CONWAY
DISTRICT COURT JUDGE

Submitted by:
MODRALL, SPERLING, ROEHL, HARRIS
& SISK, P.A.

By: /s/William R. Keleher
Attorneys for NationsBank
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APPROVED:

By: Telephonic Approval 10/7/02
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CONSTITUTIONAL PROVISIONS REGULATIONS, STATUTES AND ADMINISTRATIVE CODES

FOURTEENTH AMENDMENT

The Fourteenth Amendment to the Constitution provides that, "No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of Law; nor to deny to any person within its jurisdiction the equal protection of the laws."

SUPREMACY CLAUSE, ARTICLE VI, CLAUSE 2, OF THE UNITED STATES CONSTITUTION

The Supremacy Clause, Article VI, Clause 2, which states," This Constitution, and the Laws of the United States shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary Notwithstanding." The Seventh Amendment to the Constitution, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

NEW MEXICO CONSTITUTION ARTICLE II SECTION 1. [SUPREME LAW OF THE LAND.]

The constitution of the United States is the supreme law of the land.

NEW MEXICO, BILL OF RIGHTS, ARTICLE II, SEC. 4. [INHERENT RIGHTS.]
All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness. Sec12. The right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate.

TITLE 28, PART IV, CHAPTER 81, SUPREME COURT, 1257(a) which provides Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.
TITLE 28, PART IV, JURISDICITON AND VENUE, CHAPTER 85, DISTRICT COURTS, JURISDICTION Sec. 1331 FEDERAL QUESTION, Sec. 1332, (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between-- (1) citizens of different States;
§1359. Parties collusively joined or made
A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively

made or joined to invoke the jurisdiction of such court.

UNIFORM DECLARATORY JUDGMENT ACT
TITLE 28, PART VI, CHAPTER 151
§2202 Further Relief. Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

31 CFR§ 103.33, RECORDS TO BE KEPT AND MAINTAINED BY FINANCIAL INSTITUTIONS
Each financial institution shall retain either the original microfilm or other copy or reproduction of each of the following
(a) a record of each extension of credit in an amount in excess of $10,000 except as extension of credit secured by an interest in real property which record shall contain the name and address of the person to whom the extension of credit was made, the amount thereof, the nature or purpose thereof and the date thereof.

(b) A record of each advice, request, or instruction received or given regarding any transaction resulting (or intended to result and later canceled if such a record is normally made) in the transfer of currency or other monetary instruments, funds, checks, investment securities, or credit, of more than $10,000 to or from any person, account, or place outside the United States.

(c) A record of each advice, request, or instruction given to another financial institution or other person located within or without the United States, regarding a transaction intended to result

in the transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States.

(d) A record of such information for such period of time as the Secretary may require in an order issued under §103.26(a), not to exceed five years.

e) *Banks.* Each agent, agency, branch, or office located within the United States of a bank is subject to the requirements of this paragraph (e) with respect to a funds transfer in the amount of $3,000 or more:

(1) *Recordkeeping requirements.* (i) For each payment order that it accepts as an originator's bank, a bank shall obtain and retain either the original or a microfilm, other copy, or electronic record of the following information relating to the payment order:

(A) The name and address of the originator;

(B) The amount of the payment order;

(C) The execution date of the payment order;

(D) Any payment instructions received from the originator with the payment order;

(E) The identity of the beneficiary's bank; and

(F) As many of the following items as are received with the payment order

TITLE 12—BANKS AND BANKING, CHAPTER I, COMPTROLLER OF THE CURRENCY, DEPARTMENT OF THE TREASURY 12CFR 7.4008 SEC LENDING

(b) *Standards for loans.* A national bank shall not make a consumer loan subject to this §7.4008 based predominantly on the bank's realization of the foreclosure or liquidation value of the borrower's collateral, without regard to the borrower's ability to repay the loan according to its terms. A bank may use any reasonable method to determine a borrower's ability to repay, including, for example, the borrower's current and expected income, current and expected cash flows, net worth, other relevant financial resources, current financial obligations, employment status, credit history, or other relevant factors.

(c) *Unfair and deceptive practices.* A national bank shall not engage in unfair or deceptive practices within the meaning of section 5 of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), and regulations promulgated thereunder in connection with loans made under this §7.4008.

(d) *Applicability of State Law.* (1) Except where made applicable by Federal law, State laws that obstruct, impair or condition a national bank's ability to fully exercise its Federally authorized non-real estate lending powers are not applicable to national banks.

TITLE 12, CHAPTER 16, 1831X.
INSURANCE CONSUMER PROTECTIONS

The regulations prescribed pursuant to subsection (a) of this section shall include the following provisions relating to disclosures and advertising in connection with the initial purchase of an insurance product:

(1) Disclosures

(A) In general

Requirements that the following disclosures be made orally and in writing before the completion of the initial sale and, in the case of clause (iii), at the time of application for an extension of credit:

(i) Uninsured status

As appropriate, the product is not insured by the Federal Deposit Insurance Corporation, the United States Government, or the depository institution.

(ii) Investment risk

In the case of a variable annuity or other insurance product which involves an investment risk, that there is an investment risk associated with the product, including possible loss of value.

(iii) Coercion

The approval of an extension of credit may not be conditioned on -

(I) the purchase of an insurance product from the institution in which the application for credit is Pending or of any affiliate of the institution; or

(II) an agreement by the consumer not to obtain, or a prohibition on the consumer from obtaining, an Insurance product from an unaffiliated entity.

(B) Making disclosure readily understandable

Regulations prescribed under subparagraph (A) shall encourage the use of disclosure that is conspicuous, simple, direct, and readily understandable, such as the following:

(i) "NOT FDIC - INSURED".

(ii) "NOT GUARANTEED BY THE

BANK".[A]

(iii) "MAY GO DOWN IN VALUE".

(iv) "NOT INSURED BY ANY GOVERNMENT AGENCY".

(C) Limitation

Nothing in this paragraph requires the inclusion of the foregoing disclosures in advertisements of a general Nature describing or listing the services or products offered by an institution.

(D) Meaningful disclosures

Disclosures shall not be considered to be meaningfully provided under this paragraph if the institution or its representative states that disclosures required by this subsection were available to the customer in printed Material available for distribution, where such printed material is not provided and such information is not orally disclosed to the customer.

(E) Adjustments for alternative methods of purchase In prescribing the requirements under subparagraphs

(A) and (F), necessary adjustments shall be made for purchase in person, by telephone, or by, or by electronic media to provide for the most appropriate and complete form of disclosure and acknowledgments.

(F) Consumer acknowledgment

A requirement that a depository institution shall require Any person selling an insurance product at any office of, or on behalf of, the institution to obtain, at the time a Consumer receives the disclosures required under this paragraph or at the time of the initial purchase by

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the consumer of such product, an acknowledgment by such consumer of the receipt of the disclosure required under this subsection with respect to such product.

(2) Prohibition on misrepresentations

A prohibition on any practice, or any advertising, at any office of, or on behalf of, the depository institution, or subsidiary, as appropriate, that could mislead any person

Or otherwise cause a reasonable person to reach an erroneous belief with respect to -

(A) the uninsured nature of any insurance product sold, or offered for sale, by the institution or any subsidiary of

The institution;

(B) in the case of a variable annuity or insurance Product that involves an investment risk, the investment Risk associated with any such product; or

(C) in the case of an institution or subsidiary at which insurance products are sold or offered for sale, the fact that

- (i) the approval of an extension of credit to a customer by the institution or subsidiary may not be conditioned on the purchase of an insurance product by such customer from the institution or subsidiary; and

(ii) the customer is free to purchase the insurance Product from another source.

(d) Separation of banking and nonbanking activities

(1) Regulations required

The regulations prescribed pursuant to subsection (a) of This section shall include such provisions as the Federal Banking agencies

consider appropriate to ensure that the Routine acceptance of deposits is kept, to the extent Practicable, physically segregated from insurance product activity.

(2) Requirements

Regulations prescribed pursuant to paragraph (1) shall

Include the following requirements:

(A) Separate setting

(B) Referral that does not depend on whether the referral results in a transaction.

(C) Qualification and licensing requirements Standards prohibiting any depository institution from permitting any person to sell or offer for sale any Insurance product in any part of any office of the institution, or on behalf of the institution, unless such person is appropriately qualified and licensed.

(e) Domestic violence discrimination prohibition

(1) In general

In the case of an applicant for, or an insured under, any insurance product described in paragraph (2), the status of the applicant or insured as a victim of domestic violence, or as a provider of services to victims of domestic violence, shall not be considered as a criterion in any decision with regard to insurance underwriting, pricing, renewal, or scope of coverage of insurance policies, or payment of insurance claims, except as required or expressly permitted under State law.

(2) Scope of application

The prohibition contained in paragraph (1) shall apply to any life or health insurance product which is sold or offered for sale, as principal,

agent, or broker, by any depository institution or any person who is engaged in such activities at an office of the institution or on behalf of the institution.

(3) Domestic violence defined

For purposes of this subsection, the term "domestic violence means the occurrence of one or more of the following acts by a current or former family member, household member, intimate partner, or caretaker:

(A) Attempting to cause or causing or threatening another person physical harm, severe emotional distress, psychological trauma, rape, or sexual assault.

(B) Engaging in a course of conduct or repeatedly committing acts toward another person, including following the person without proper authority, under circumstances that place the person in reasonable fear of bodily injury or physical harm.

(C) Subjecting another person to false imprisonment.

(D) Attempting to cause or cause damage to property so as to intimidate or attempt to control the behavior of another person.

(f) Consumer grievance process

The Federal banking agencies shall jointly establish a consumer complaint mechanism, for receiving and expeditiously addressing consumer complaints alleging a violation of regulations issued under the section, which shall -

(1) establish a group within each regulatory agency to receive such complaints;

(2) develop procedures for investigating such complaints;

(3) develop procedures for informing consumers of rights they may have in connection with such complaints; and

(4) develop procedures for addressing concerns raised by such complaints, as appropriate, including procedures for the recovery of losses to the extent appropriate.

(g) Effect on other authority

(1) In general

No provision of this section shall be construed as granting, limiting, or otherwise affecting -

(A) any authority of the Securities and Exchange Commission, any self-regulatory organization, the Municipal Securities Rulemaking Board, or the Secretary of the Treasury under any Federal securities law; or

(B) except as provided in paragraph (2), any authority of any State insurance commission (or any agency or office performing like functions), or of any State securities commission (or any agency or office performing like functions), or other State authority under any State law.

(2) Coordination with State law

(A) In general

Except as provided in subparagraph (B), insurance customer protection regulations prescribed by a Federal banking agency under this section shall not apply to retail sales, solicitations, advertising, or offers of any insurance product by any depository institution or to any person who is engaged in such activities at an office of such institution or on behalf of the institution, in a State where the State has in effect statutes, regulations, orders, or

interpretations, that are inconsistent with or contrary to the regulations prescribed by the Federal banking agencies.

(B) Preemption

(i) In general

If, with respect to any provision of the regulations prescribed under this section, the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, and the Board of Directors of the Corporation determine jointly that the protection afforded by such provision for customers is greater than the protection provided by a comparable provision of the statutes, regulations, orders, or interpretations referred to in subparagraph (A) of any State, the appropriate State regulatory authority shall be notified of such determination in writing.

(ii) Considerations Before making a final determination under clause (i), the Federal agencies referred to in clause (i) shall give appropriate consideration to comments submitted by the appropriate State regulatory authorities relating to the level of protection afforded to consumers under State law.

(iii) Federal preemption and ability of States to override Federal preemption

If the Federal agencies referred to in clause (i) jointly determine that any provision of the regulations prescribed under this section affords greater protections than a comparable State law, rule, regulation, order, or interpretation, those agencies shall, send a written preemption notice to the appropriate State regulatory authority to notify the State that

the Federal provision will preempt the State provision and will become applicable unless, not later than 3 years after the date of such notice, the State adopts legislation to override such preemption.

(h) Non-discrimination against non-affiliated agents

The Federal banking agencies shall ensure that the regulations prescribed pursuant to subsection (a) of this section shall not have the effect of discriminating, either intentionally or unintentionally, against any person engaged in insurance sales or solicitations that is not affiliated with a depository institution.

TITLE 12, CHAPTER 16, Sec.1953(c) Acceptance of automated records The Secretary shall permit an uninsured bank or financial institution to retain or maintain records referred to in subsection (a) of this section in electronic or automated form, subject to terms and conditions established by the Secretary

TITLE 12 CHAPTER 16--FEDERAL DEPOSIT INSURANCE CORPORATION Sec. 1829b. RETENTION OF RECORDS
BY INSURED DEPOSITORY INSTITUTIONS (a) Congressional findings and declaration of purpose (1) Findings Congress finds that-- (A) adequate records maintained by insured depository institutions have a high degree of usefulness in criminal, tax, and regulatory investigations or proceedings, and that, given the threat posed to the security of the Nation on and after the terrorist attacks against the United States on

September 11, 2001, such records may also have a high degree of usefulness in the conduct of intelligence or counterintelligence activities, including analysis, to protect against domestic and international terrorism; and (B) microfilm or other reproductions and other records made by insured depository institutions of checks, as well as records kept by such institutions, of the identity of persons maintaining or authorized to act with respect to accounts therein, have been of particular value in proceedings described in subparagraph (A).

UNIFORM DECEPTIVE TRADE PRACTICE ACT Any NMSA 57-12-2 (D) "unfair or deceptive trade practice" means an act specifically declared unlawful pursuant to the Unfair Practices Act [57-12-1 NMSA 1978], a false or misleading oral or written statement, visual description or other representation of any kind knowingly made in connection with the sale, lease, rental or loan of goods or services or in the extension of credit or in the collection of debts by a person in the regular course of his trade or commerce, which may, tends to or does deceive or mislead any person and includes

(14) using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if doing so deceives or tends to deceive;

(15) stating that a transaction involves rights, remedies or obligations that it does not involve;

17) failure to deliver the quality or quantity of goods or services contracted for and

NMSA 57-12-2 E. "unconscionable trade practice" means an act or practice in connection with the sale, lease, rental or loan, or in connection with the offering for sale, lease, rental or loan, of any goods or services, including services provided by licensed professionals, or in the extension of credit or in the collection of debts which to a person's detriment:

(1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or

(2) results in a gross disparity between the value received by a person and the price paid.

[NMSA 57-12-10] PRIVATE REMEDIES B. Any person who suffers any loss of money or property, real or personal, as a result of any employment by another person of a method, act or practice declared unlawful by the Unfair Practices Act [57-12-1 NMSA 1978] may bring an action to recover actual damages or the sum of one hundred dollars ($100), whichever is greater. Where the trier of fact finds that the party charged with an unfair or deceptive trade practice or an unconscionable trade practice has willfully engaged in the trade practice, the court may award up to three times actual damages or three hundred dollars ($300), whichever is greater, to the party complaining of the practice.

TITLE 15 COMMERCE AND TRADE, CHAPTER 20, REGULATION OF INSURANCE, SECTION 1012(b) Regulation by State law; Federal law relating specifically to insurance; applicability of

certain Federal laws after June 30, 1948
(b) Federal regulation
No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [15 U.S.C. 41 et seq.], shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

TITLE 15 CHAPTER 41 SUBCHAPTER V,
§ 1692e. FALSE OR MISLEADING REPRESENTATIONS
A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt.
Without limiting the general application of the foregoing, the following conduct is a violation of this section:
(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.
(2) The false representation of—
(A) the character, amount, or legal status of any debt; or

A-1 (B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to—

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this subchapter.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely

represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(15) The false representation or implication that documents are not legal process forms or do not

require action by the consumer.
(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 1681a (f) of this title.

A-1

TITLE 15 COMMERCE AND TRADE CHAPTER 41, CONSUMER CREDIT PROTECTION, SUB CHAPTER V, 1692f UNFAIR PRACTICES

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.
(2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.
(3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.
(4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.
(6) Taking or threatening to take any nonjudicial

action to effect dispossession or disablement of property if—
(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;
(C) the property is exempt by law from such dispossession or disablement.

TITLE 15--COMMERCE AND TRADE CHAPTER 41--CONSUMER CREDIT PROTECTION SUBCHAPTER VI--ELECTRONIC FUND TRANSFERS Sec. 1693. Congressional findings and declaration of purpose (a) Rights and liabilities undefined The Congress finds that the use of electronic systems to transfer funds provides the potential for substantial benefits to consumers. However, due to the unique characteristics of such systems, the application of existing consumer protection legislation is unclear, leaving the rights and liabilitics of consumers, financial institutions, and intermediaries in electronic fund transfers undefined. (b) Purposes, It is the purpose of this subchapter to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems. The primary objective of this subchapter, however, is the provision of individual consumer rights.

TITLE 15 - COMMERCE AND TRADE
CHAPTER 96 - ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE
SUBCHAPTER I - ELECTRONIC RECORDS AND SIGNATURES IN COMMERCE

15 USC Sec. 7001
-HEAD-
Sec. 7001. General rule of validity
-STATUTE-
(a) In general
Notwithstanding any statute, regulation, or other rule of law (other than this subchapter and subchapter II of this chapter), with respect to any transaction in or affecting interstate or foreign commerce -
(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and
(2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.

TITLE 16 CFR Commercial Practices 444—Credit Practices Sec. 444.2 UNFAIR CREDIT PRACTICES. (a) In connection with the extension of credit to consumers in or affecting commerce, as commerce is defined in the Federal Trade Commission Act, it is an unfair act or practice within the meaning of Section 5 of that Act for a lender or retail installment seller directly or indirectly to take or receive from a consumer an obligation that: (1) Constitutes or contains a cognovit or confession of judgment (for purposes other than executory process in the State of Louisiana), warrant of attorney, or other waiver of the right to notice and the opportunity to be heard in the event of suit or process thereon. (2)

Constitutes or contains an executory waiver or a limitation of exemption from attachment, execution, or other process on real or personal property held, owned by, or due to the consumer, unless the waiver applies solely to property subject to a security interest Executed in connection with the obligation.

§ 444.3 Unfair or deceptive cosigner practices.

(a) In connection with the extension of credit to consumers in or affecting commerce, as commerce is defined in the Federal Trade Commission Act, it is:

(1) A deceptive act or practice within the meaning of section 5 of that Act for a lender or retail installment seller, directly or indirectly, to misrepresent the nature or extent of cosigner liability to any person.

(2) An unfair act or practice within the meaning of section 5 of that installment seller, directly or indirectly, to obligate a cosigner unless the cosigner is informed prior to becoming obligated, which in the case of open end credit shall mean prior to the time that the agreement creating the cosigner's liability for future charges is executed, of the nature of his or her liability as cosigner.

(b) Any lender or retail installment seller who complies with the preventive requirements in paragraph (c) of this section does not violate Act for a lender or retail paragraph (a) of this section.

(c) To prevent these unfair or deceptive acts or practices, a disclosure, consisting of a separate document that shall contain the following statement and no other, shall be given to the cosigner prior to becoming obligated, which in the case of open end credit shall mean prior to the

time that the agreement creating the cosigner's liability for future charges is executed:

Notice to Cosigner

You are being asked to guarantee this debt. Think carefully before you do. If the borrower doesn't pay the debt, you will have to. Be sure you can afford to pay if you have to, and that you want to accept this responsibility.

You may have to pay up to the full amount of the debt if the borrower does not pay. You may also have to pay late fees or collection costs, which increase this amount.

The creditor can collect this debt from you without first trying to collect from the borrower. The creditor can use the same collection methods against you that can be used against the borrower, such as suing you, garnishing your wages, etc. If this debt is ever in default, that fact may become a part of *your* credit record.

This notice is not the contract that makes you liable for the debt.

NEW MEXICO ADMINISTRATIVE CODE, NMAC 13.14.18.8 PROMULGATED FORMS: Policies, Endorsements, Binders, Commitments, Certificates, Closing Protection Letters, Notice of Availability of Owners Title Insurance and Facultative Reinsurance Agreements are not to be filed with the Superintendent for approval as responsibility rests upon the title underwriting companies to see that only standard promulgated forms are used by themselves and their authorized agents to insure

interests in New Mexico property.[6-16-86, 4-1-96; 13.14.18.8 NMAC - 13 NMAC 14.2.8, 5-15-00]

NMAC 13.14.18.9 ALTERATION OR SUBSTITUTION OF FORMS PROHIBITED:

A. No person, firm or organization may alter or otherwise change any title insurance form promulgated by the Superintendent, or use any non-promulgated endorsement or rider, except (1) upon public hearing called for such purpose and upon a determination by the Superintendent that the same be proper, or (2) in a manner specifically authorized by these regulations as amended from time to time.

NEW MEXICO ADMINISTRATIVE CODE;

NMAC 13.14.4.8 (A) accepting funds without written escrow instructions

NMAC13.14.4.8 (E), disbursing funds when there aren't available funds

NMAC 13.14.4.8 (G), failing to deliver to each party a statement of the receipts and disbursements made by or on behalf of each party to the escrow

NMAC13.14.4.8 (H). failing to act with impartiality as it relates to any party to an escrow as it relates to disbursement of funds

NMSA 1978 Section 59A-12-13 and 13.14.3.8.1

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(2)

FILED
JUN 2 6 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No.07-1224

In the Supreme Court of the United States

Susan B. Showalter,
Petitioner;
v.

NationsBank, N.A.,
Respondent;
v.

Albuquerque Title Company, Inc.
Respondent;

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF
THE STATE OF NEW MEXICO

PETITION FOR REHEARING

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CONSTITUTIONAL PROVISIONS REGULATIONS AND STATUTES

NMSA 57-12-2 (D)(14)(15)(17) UNFAIR TRADE PRACTICES, Any false or misleading oral or written misrepresentation of any kind made in the regular course of trade or commerce in connection with the sale of services or in the extension of credit or in the collection of debts which does or tends to deceive any person NMSA 57-12-1(D)(14) by using innuendo or ambiguity as to a material fact if doing so deceives or tends to deceive (15) stating that a transaction involves rights, remedies, or obligations which it does not have,(17) failure to deliver the quality or quantity of goods or services contracted for, and, an
NMSA 57-12-2 (E) (2) UNCONSCIONABLE TRADE PRACTICE which results in a gross disparity between the value received by a person and the price paid...7-8.

ARTICLE VI, CLAUSE 2, SUPREMACY CLAUSE
This Constitution and the Laws of the United States shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound

thereby, any Thing in the Constitution or Laws of any State to the Contrary Notwithstanding.....13

SEE PETITION FOR REGULATIONS

PETITION FOR REHEARING

Petitioner, Susan B. Showalter, moves the Court for Petition for Rehearing based on substantial grounds not previously presented of intervening circumstances of a controlling effect and procedural errors outside normal and accepted judicial procedure which has deprived Petitioner of Property calling for this Court's supervisory authority over a proceeding which has affected her property rights. New Mexico Court failed to realize that the Wisconsin Order protected Petitioners interest, failed to reverse judgments not based on substantial evidence and grant Petitioner damages for Unfair Trade Practices.

The following outlines the Intervening Circumstances of a Controlling Effect or substantial grounds not previously presented:

No one had authorization to use Petitioners funds in the transaction.

Petitioner did not receive an interest in the Title or in an entity holding title. Petitioner was not a party to the Purchase Agreement. There were no written escrow agreements signed by all parties to the transaction. There were no duly authorized powers of attorney.

The proximate cause of the litigation was Albuquerque Title Company, who violated the Administrative Code. They failed to use forms as promulgated for use by the Superintendent of Insurance, accepted funds which did not correspond to the purchase contract, without escrow instructions signed by all parties to the transaction, misrepresented that Petitioner's funds would be protected if held in her own account and under her social security number and control, they did not have

duly acknowledged power of attorney, commingled funds under Petitioners name and social security number, failed to Interplead, proceeded to closing, did not produce conflicting demands on them, and refused to acknowledge Petitioners attorneys notice that due to material changes to the contract Petitioner was entitled to her funds.

Buyer refused to provide promised documentation to recognize Petitioners interest in the Title. Petitioner asked if her attorney could prepare docs and Buyer agreed. Petitioner set up the closing on the scheduled date, and Buyer and Seller agreed not to close.

Instead of closing the transaction Petitioner agreed to on the scheduled date, Buyer and Seller agreed to amend the expired contract and close with a real estate installment contract with limited rights of redemption, which Petitioner did not agree to.

Petitioner had informed Buyer, Seller, and Title Company that she did not agree to close without formal documentation.

These funds were not escrow funds. They were earnest money funds which are refundable.

On November 23, 1998, Wisconsin Transcript states,"the Order which proceeds this dismissal without prejudice and that's important here that it be placed in a separate escrow account in the bank with the understanding that the money should not be paid over to NationsBank. He expressed concern that a transaction had been closed, despite the Injunction, using a land installment contract and he wanted to preserve Petitioners interest."[1]

The funds are in an interest bearing account for

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[1] Judge, "I think that the Court can do something that still preserves the Interest of Susan B. Showalter"

the benefit of Petitioner, Buyer, or Albuquerque Title, not NationsBank.

No Order has been entered to address the Wisconsin Order regarding who benefits from the Interest.

Court failed to realize Wisconsin Judge acted to protect Petitioners interest.

Bank reported Petitioner to the FBI who found Petitioner did not misappropriate funds which she has been deprived of.

Buyer defaulted on the property.

NationsBank Access Identifier Agreement states that if any inconsistency exists between the Deposit Agreement and this agreement, then this Agreement Governs.[2]

An Owners Insurance Policy was provided, however, Petitioner was denied payment by the Title Insurer; no record of her funds being used in the transaction.

The presiding Judge left the bench prior to addressing damages on Petitioner's Unfair Trade Practices claims.

ARGUMENT

On March 4, 2002 in CV-98-11599, Petitioner's Attorney made the following argument to the New Mexico Court of Appeals:

> The Court concludes that it is undisputed that ATC opened an Interest bearing account at NationsBank for the earnest money pursuant to the purchase agreement. However, there is no evidence in the record to support that conclusion; or at the very least there are disputed material facts on

[2] NationsBank Access Identifier Agreement (RP064)

this issue.

> "A review of the entire record demonstrates that there is no testimony from ATC or NationsBank regarding the terms of the account. Nor is there any documentary evidence to support the claim that the account was set up pursuant to the Purchase Agreement. There is no signature card showing that ATC personnel were allowed to withdraw the money."

"Neither ATC nor NationsBank were able to locate a signature card."

> "It is also significant that in 1999, Ms. Showalter executed a W-9 form at the request of NationsBank. (RP 1667-1676) This was equivalent to a signature card according to NationsBank's own documents. (RP 0863-0872) Thus Ms. Showalter was a signatory on the account. That piece of evidence alone is evidence of Ms. Showalter's authority to withdraw her money."

In addition he argued:

> 2. "On December 13, 1999, while at NationsBank ...Showalter provided her name social security number and photo ID. The NationsBank computer and the resultant printout showed that Ms. Showalter was the Owner of Account 002864366166 which was a money market saving account. (RP 1660-1664)"
>
> 3. "Ms. Showalter was told that she was the owner of the two accounts on the computer screen and that neither was an escrow account. (RP 1660-1664)"

6. "On or about October 19, 1998, Ms. Showalter withdrew her $158,813.77 from her Account 002864366166 and had the funds deposited in her other NationsBank account. This was pursuant to advice from her attorney. The funds were then transferred from that account and deposited in her Everen Securities account. These transactions were necessarily accomplished with the complex knowledge cooperation and approval of NationsBank. Ms. Showalter followed every NationsBank procedure and requirement and accessed her account electronically via the telephone banking system with her social security and PIN numbers. (RP 1628-1629) (RP 1677-1681)"

7. "According to the NationsBank Access Identification Agreement and Disclosure:

Dear NationsBank Customer:

Beginning on July 12, 1998 you will be able to transfer funds between accounts using your Access ID and Personal Identification Number (PIN). The agreement goes on to provide in Part 1(d) that NationsBank will link all your deposit and personal credit accounts that are eligible unless you tell us otherwise. (RP0618-630)"

8. "A withdrawal of $158,813.77 would have received close review by Bank personnel to assure the withdrawal was correct. Part of that review would include a careful verification that Ms. Showalter was authorized to withdraw the funds. (RP1682-1689)"

9. "NationsBank Domestic Wire

Transfer-Secondary Approval: documentation states on its face that the wire transfer was "Transaction Approved ID: 61011019980735" and clearly demonstrates that this wire transfer was authorized and approved by NationsBank. (RP 0223)"

10. "At no time did anyone at NationsBank inform Ms. Showalter that she was not entitled to withdraw funds from the account. In fact all representations were to the contrary. (RP 1620-1627)"

"The obvious conclusion is that NationsBank had established an account that allowed Ms. Showalter to withdraw her money."

"Under these facts the law of New Mexico does not permit the drastic remedy of summary judgment. The Court shall not resolve factual issues. Where there is the existence of a material factual dispute and where evidence does not exist, summary judgment is improper; in reviewing an appeal from an order granting summary judgment, this court shall review the matters presented in the light most favorable to support a trial on the merits; summary judgment is improper, where there is the slightest doubt as to the existence of a material factual dispute; and where evidence is susceptible to reasonable or logical conflicting influences bearing on material facts, summary judgment is improper. Showalter respectfully requests that Court follow these rules and reverse the grant of Summary Judgment regarding NationsBank."

Based on this Motion, New Mexico Court of Appeals reversed the District Court decision on Petitioners Unfair Trade Practice claim in Petitioners favor against Albuquerque Title Company, Inc. [3](ATC)

New Mexico Appellant Court found,

> "Showalter's affidavit to the effect that ATC agreed to place her monies in a separate account established a genuine issue of material fact as to whether ATC stated that the transaction involved rights (the creation of a separate account for Showalter) that it did not involve and as to whether ATC failed to deliver services that it contracted with Showalter to provide."[4]

NationsBank's memorandum in support of motion for Summary Judgment, attached ATC testimony, "There were two accounts; one for Midwest and one for Susan[5]" and documentary evidence in Petitioners Response to Summary Judgment of ATC supports the fact ATC represented there were two accounts; letter written by ATC to NationsBank requested "Closing of trust accounts;"[6] there were two title company forms for the investment of funds.[7] This is evidence that ATC represented there were two accounts and no disputed material facts regarding whether ATC failed to deliver services they contracted with Showalter to provide. NMSA 57-12-2 (D) (17)

The Court further stated,

"Even assuming that ATC did not have the

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[3] Memorandum Opinion, March 20, 2002 (RP2002)
[4] Memorandum Opinion, March 20, 2002, (RP2000)
[5] Deposition McIntyre, ATC (RP1406)(RP0388)
[6] ATC letter (RP1066)
[7] Investment Forms (RP1830,1845,1846)

> authority to open a separate account for Showalter, the Unfair Trade Practices Act nevertheless can be invoked. The essence of an Unfair or deceptive trade practice is the misrepresentation. As alleged by Showalter, a violation can occur by stating that a transaction involves rights that it does not involve. Section 57-12-2(D)(15) Therefore, if ATC agreed, as Showalter alleges, to place her earnest money deposit in a separate bank account, its statement of agreement is a misrepresentation that violates the Act because it is false and misleading and may tend to or does deceive."[8]

Court failed to recognize 57-12-2(D) (15) includes "stating a transaction has rights, remedies, or obligations, which it does not." ATC represented Petitioner could collect against the equity in the property, a remedy that Petitioner did not prevail on. Court recognized Showalter's claim 57-12-2(D)(14) that an Unfair Trade Practice may occur by using innuendo or ambiguity as to a material fact if doing so deceives or tends to deceive.

Court of Appeals acknowledged,

> "Showalter bases her Unfair Trade Practices counterclaims on NMSA 1978, § 57-12-2 (E(1)(2) which identifies as "unconscionable trade practice" any act in connection with the provision of services which "results in a gross disparity between the value received by a person and the price paid."

Petitioner proved all elements of Unfair Trade Practices for an Unconscionable Trade Practice. In

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[8] Memorandum Opinion March 20, 2002 (RP2000)

her claims and to the New Mexico Court of Appeals throughout the litigation she argued,

> "The actions of ATC and NationsBank in knowingly misrepresenting that the transaction had rights or remedies which it did not have, failing to state material facts, and in failing to provide insurance, were misrepresentations made in connection with services and in the unauthorized extension of credit, in the ordinary course of business which to Appellant's detriment took advantage of her lack of experience to a grossly unfair degree and resulted in a great disparity between the value received by Appellant and the price paid [NMSA 57-12-2(D(E)]" Unconscionable Trade Practice of NationsBank and ATC to advance $318,705 in Petitioners name to close a transaction knowing Petitioner would not receive an interest in the title.

Court of Appeals reversed the Unfair Trade Practice claim in Petitioners favor, did not reverse the Summary Judgment on NationsBank's Complaint, affirmed the prior decisions of the Trial Court which granted NationsBank summary judgment on all Petitioners claims except Malicious Abuse of Process and a portion of her Unfair Trade Practice claim against NationsBank Stating "Because the court did not grant summary judgment on this Unfair Practices Act issue against NationsBank, we do not address Showalter's arguments in this regard."[9]

Judgment on Mandate did not accurately reflect the Memorandum Opinion affirming the Trial Court because NationsBank and ATC had only been granted

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[9] Memorandum Opinion March 20,2002 (RP1995)

partial Summary Judgment, Petitioner was a non-moving party as argued by Petitioner in Motion for Rehearing on Appeal 25,105, and the Court had not taken action consistent with the Mandate regarding Petitioners Unfair Trade Practice Claims in view of the fact that the Mandate noted the decision of the Trial Court is now final and remanded for further action consistent with the decision.[10]

Then, the Court allowed NationsBank to move for Summary Judgment on Petitioners remaining claims, which had already been heard in their motion for Summary Judgment on the Counter-Claim,[11] had survived Summary Judgment, no new evidence had been presented.

Petitioner's Counterclaims and Motion for Rehearing to Court of Appeals on 07/06/07 included the argument that the Court may have overlooked Fraud. Parol-evidence rule does not allow evidence to controvert an express agreement, however, it can be used to explain that an agreement was not fully integrated due to Buyer's refusal to provide documentation recognizing Petitioners interest in the title. It can also be used to show fraud, illegality or unconscionable practice. Court ruled Petitioner could move forward on Breach of an Oral agreement with ATC to protect her money[12] however Court of Appeals ruled her claims were Unfair Trade Practices.

New Mexico allows Unfair Trade Practice claims be judicially resolved.[13]

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[10] Mandate of Court of Appeals entered May 12, 2002
Judgment on Mandate entered October 11, 2002

[11] NationsBank Motion for Summary Judgment on the Complaint and the Counter-Claim (RP1381)

[12] Transcript February 1,2002

[13] *Lisanti v. Alamo,* 2002-NMSC-032
132 N.M. 750, 55 P.3d 962

Court of Appeals found there was no indication that the Trial Court did not consider Showalter's statement of undisputed facts in its consideration of NationsBank Summary Judgment, however Court did not consider her disputed facts. The purpose of summary Judgment is to focus the litigation on genuine issues of material fact and Civ.R.56 and case law do not support the proposition that a party responding to a Motion for Summary judgment has the burden to conclusively demonstrate its case, but to produce only enough evidence to show that a genuine issue of material fact exists for trial[14] Evidence relied upon by NationsBank was the testimony of ATC and Townsend (VP Security), in support of their argument that Petitioner was not a signatory on the account. Showalter motioned to strike hearsay testimony in Wisconsin, however, Court never ruled. She argued on Appeal, Motion in Opposition to Proposed Disposition that Townsend deposition, contradicted his prior affidavit. Attorney: Q: You never saw a signature card for this account? A: Never. (Townsend Deposition, pg. 47 lines 16-17). Petitioner's Response to NationsBank's Motion for Summary Judgment set forth specific facts showing genuine issues of material fact regarding the signature authority on the account including the signature card sent to Ms. Showalter with her name and social security number,[15] and Petitioner argued undisputed facts,[16] such that a genuine issue exists

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[14] Showalter Response to NationsBank Motion for Summary Judgment(RP1603)

[15] Showalter's Response to NationsBank Motion for Summary Judgment(RP1609)

[16] Showalter's Response to ATC (RP1788)

and the decision of the New Mexico Court of Appeals should be reversed.

Legal fees were granted to NationsBank based on Petitioner's Depository Agreement

United States Supreme Court has jurisdiction when fundamental and substantial rights have been affected by lack of due process and jurisdiction over a proceeding where Petitioner claimed Title to an Instrument or an Interest in Property. In her Counterclaim for Malicious Abuse of Process and in Motion for Rehearing to Court of Appeals Petitioner argued she had no Notice of the temporary restraining Order, she was not named, and "Personal service cannot be waived for collection of a purported debt." Wisconsin Court directed the litigation be for the legal right to the funds. NationsBank was not entitled to legal fees "pursuant to common law, statute, or court rules." New Mexico Court of Appeals found no abuse of process because Showalter was not sued by NationsBank in Wisconsin.

Wisconsin Judge stated, "It will be the Order of this Court, there's been no service of any of the summons and complaint yet in this case that this case be dismissed without prejudice and costs."[17] The Order should be void.

Seller, Lender on the REC, issued instructions to close, refused to recognize Petitioner's interest in the Title, did not join the Declaratory Judgment, Sued Petitioner for Quiet Title. New Mexico Court of Appeals found the Court had no obligation to consolidate the cases even though Petitioner had conversion claims in this case.

No Party filed any cross-appeals.

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[17] Transcript Wisconsin CV-008851 (RP2435)

CONCLUSION

Rights in Property are basic civil rights Congress intended to protect in the Act of 1871 and the Supremacy Clause.

Petitioner requests this Court rectify procedural improprieties which have exceeded the boundaries of normal and accepted judicial proceedings such as to call for this Court's exercise of its supervisory powers. Federal law preempts the State with regard to recordkeeping of funds transfers and in disclosures required to be made by Federal law in the sale of insurance if it provides greater protection for the Consumer.

Under the facts, the law of New Mexico does not permit the drastic remedy of summary judgment for the Bank Petitioner asks this Court to review the matters in the light most favorable to support a trial on the merits; Showalter respectfully requests that Court follow these rules and reverse the grant of Summary Judgment regarding NationsBank on their Declaratory Judgment, reverse Petitioners claims which did not survive Summary Judgment, award damages pursuant to the Mandate of the Cour of Appeals under the Unfair Trade Practice Act or dispose of the case on the merits of her Claims.

CERTIFICATE OF PETITIONER

Petitioner certifies that this Petition for Rehearing is based upon substantial grounds not previously presented, and is presented in good faith and not for purposes of delay.

Respectfully Submitted,

"s/" Susan B. Showalter
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